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## Documenting the Impact of Measure 37: Selected Case Studies

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# **Documenting the Impact of Measure 37: Selected Case Studies**

## **Final Report**

Prepared By

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# Introduction

Oregon has long been known for progressive planning policies and visionary government. The passage of Senate Bill 100 in 1973 ushered in Oregon's modern era of land use planning and reflected a commitment by Oregonians to the protection of farm land and other natural resources while planning for substantial urban growth. Many other states have envied Oregon's framework as they struggle with the pressures of urban sprawl. While other states were quickly converting farmland to residential uses, Oregon converted just over one percent of its farmland to other uses between 1982 and 1997.<sup>1</sup>

On November 2, voters in Oregon chose to approve Measure 37 by a fairly wide margin. Although the message implied by that vote is widely debated, one thing is clear: Measure 37 has disabled the tools used over the past four decades to prevent sprawl and preserve agricultural and forest land in Oregon. We suspect that, based on experience in Florida with a similar measure, Measure 37 will also have a chilling effect on innovation in land use planning within local government. Although the legal status of the Measure is currently unclear (see below), we expect opponents of the land use system to continue to press for weakening these tools in Oregon.

Efforts are underway to pass similar measures in other states. For example, property rights advocates are working in the state of Washington to make another attempt similar to failed Referendum 48, which was rejected by Washington voters in 1995. Before such an initiative is approved by voters, it is important that they understand how Measure 37 will affect land use planning in Oregon. However, the full impact of Measure 37 will be slow to unfold, as the courts make decisions about issues such as the transferability of waivers, the applicability of exceptions, and the rights of local governments to create a cause of action for neighbors affected by Measure 37 waivers.

## ***Objectives***

The objective of this project was to investigate and describe the impacts of a variety of Measure 37 claims and decisions on the following:

- residential neighbors of Measure 37 claimants;
- farms and farm-related businesses that may lose the critical mass required to continue farming in certain areas of Oregon;
- forests and the forestry industry in the state of Oregon;
- state and local governments attempting to implement sensible land-use policy under very tight budget conditions.

Documenting these impacts provides a clearer picture of how other states might be affected by the passage of similar takings or property rights legislation.

## ***Case Study Selection***

In choosing the cases for study, we looked for broad geographical dispersion and a variety of current and proposed uses. Unfortunately, there are very few Measure 37 claims for commercial uses, and those we investigated proved to have problems with validity. The result is that all of the claims we examined are proposing residential uses.

We also chose claims that appeared to be legally valid under the provisions of Measure 37. Thus, we chose cases that had already been examined by state and local government. In some cases, the state and/or county had not ruled on the claim prior to the Marion County Court's decision in the *MacPherson* case, which put a halt to claims processing at the state and many counties (see below). Table 1 contains a summary of the cases described in this report.

## ***Case Study Content***

Each case study contains an executive summary and six sections:

- **Introduction**, highlighting some of the key issues raised by the case;
- **Description of the claim**, explaining the facts of the Measure 37 claim;
- **History and current conditions**, which describes the geographical area and discusses conditions leading to the claim;
- **Probability of development**, which discusses the status of the claim, other conditions that will have to be met before the claim can move forward, and market factors that might determine whether the proposed development actually happens;
- **Potential impacts of development**, which describes the primary impacts of development on the parcel;
- **Summary**, which restates the main findings of the case study.

The development impacts examined include impacts on the general appearance and character of the neighborhood, environmental impacts, economic impacts, and impacts on local government.

## ***Measure 37 Legal Status***

For each of these cases, the legal status, and therefore the probability of development, has been affected by a recent ruling by the Marion County Circuit Court. On October 14, 2005, the Marion County Circuit Court issued an opinion in *MacPherson v. Department of Administrative Services*, Case No. 05C10444, holding that Measure 37 is unconstitutional. On October 24, 2005, the court entered a judgment and an order in the *MacPherson* case directing all defendants, including the Department of Administrative Services and the Department of Land Conservation and Development, not to accept, grant, deny or otherwise rule on any claims under Measure 37. The order also determined that all timelines under Measure 37 are suspended indefinitely. Moreover, the state believes that all orders to not apply regulations issued before the court decisions have no legal effect, at least pending the outcome of the *MacPherson* appeal. Thus, the legal status of any waivers granted under Measure 37 is still unclear, and the impacts identified in the case studies will hinge on the legality of the waivers. Oral arguments will be heard by the Oregon Supreme Court on January 10, 2006.

**Table 1. Summary of Measure 37 Case Studies**

<b>Case Number</b>	<b>Title</b>	<b>County</b>	<b>Number of Acres</b>	<b>Current Zoning</b>	<b>Proposed Use</b>	<b>Requested Compensation</b>
1	Development in the Stafford Triangle	Clackamas	105	Exclusive Farm Use	Division into one- or two-acre residential lots	\$14,180,807
2	Community Planning in North Portland	Multnomah	.44	Medium-Density, multi-dwelling (up to 19 units)	High Density residential (up to 75 units)	\$500,000
3	Small Residential Subdivision in the Heart of Pear Orchards	Hood River	19	Exclusive Farm Use	Division into ten residential lots	\$1,122,000
4	A Residential Subdivision in Yamhill County's Vineyards	Yamhill	51	Exclusive Farm Use	Divide into twenty 2.5-acre residential lots	3,000,000
5	Home Sites for Family Members near Astoria	Clatsop	10	Residential Agriculture; Residential Forestry	Divide into one-acre residential lots	Not specified
6	One Farm Dwelling in Jefferson County	Jefferson	40	Exclusive Farm Use	Build a single Dwelling	\$100,000
7	Residential Subdivision on Productive Farmland in Washington County	Washington	73	Exclusive Farm Use	Divide property into 73 residential lots; construct a community water system	\$4,585,000
8	Partition Commercial Woodland in Coos County	Coos	122	Exclusive Farm or Forest	Divide into 20-acre lots	\$225,000
9	Ranchland Subdivision near City Limits	Wallowa	69	Exclusive Farm Use	Divide into 33 residential lots	\$1,980,000
10	Forestland Conversion near Grants Pass	Josephine	40	Woodlot Resource	Divide into eight 5-acre residential lots	\$1,200,000

## Conclusions

From the cases examined, we can draw some general conclusions and observations about the impact that Measure 37 and the resulting development. These observations can be organized according to the goals of the Oregon land use planning system. Below, we offer observations about those goals that we feel are most affected by the Measure, as demonstrated by the case studies. Our omission of goals does not mean that we think Measure 37 has no impact; it simply means that the ten case studies we examined did not present evidence to support a particular view.

### ***Goal 1: Citizen Involvement***

Measure 37 interferes in several ways with the goal of citizen involvement in the planning system. First, in deciding Measure 37 cases, county commissioners and city councilors had no choice but to decide as valid claims that meet the legal requirements of the measure. They cannot consider public testimony of any kind in determining the legal validity of the claim. They can, however, consider public testimony in determining whether to pay compensation or waive the planning regulations in question. In fact, ***not a single claim has been paid***. For all valid claims, the remedy chosen has been waiver of the regulations rather than payment of compensation. The local governments simply do not have the resources to consider paying these claims.

Second, as demonstrated by Case Study 2, a Measure 37 claimant may be able to use land in a way that is inconsistent with a community's adopted plan—even a plan developed with significant public input. If the plan was adopted after the claimant purchased his property, and if the claimant views the plan as damaging to his personal interests, he is free, with a Measure 37 waiver, to thwart the will of the community and pursue his personal interest.

### ***Goal 2: Land Use Planning***

Goal 2 is to establish a land use planning process and policy framework as a basis for all decisions and actions related to use of land and to assure an adequate factual base for decisions and actions. Measure 37 prevents the State of Oregon from accomplishing this goal in many ways.

First, decisions about development are no longer based on facts regarding the potential impact of alternative courses of action. These decisions no longer consider the social, economic, energy and environmental needs of the community. The only considerations are the individual's wishes, the date on which he purchased his property, and the land use laws in force at the time. Policymakers cannot consider, for example, how an individual's development might affect a neighbor who based investment decisions on the protections offered by the land use system.

Second, policymakers' ability to use new information to adapt land use plans is limited. Any change in land use regulations now must be examined to determine whether any individual landowner might perceive the change as against his personal financial interest. In the course of this study, we interviewed several policy makers who expressed concern that these considerations will prevent legislative bodies from enacting new regulations that might provide benefits for the entire community.

### ***Goal 3: Preserving Farmland***

In most cases, Measure 37 interferes with the goal of preserving farmland. In many cases, residential development in an agricultural area is likely to cause conflicts between residential and agricultural uses and thereby affect the farmers' ability to earn a profit. This impact is illustrated in Cases 4 and 7. Although this occurs in many states in the nation, the irony of the way Measure 37 is playing out in Oregon is that farmers that do not obtain a Measure 37 waiver are still subject to the land use regulations even though the waiver of these regulations for others is negatively affecting their ability to farm.

However, there may be cases in which Exclusive Farm Use Zoning may actually be harming the farmer's ability to maximize the productivity of the land. Case study 6 demonstrates a situation in which exempting the land from the farm income test may support, rather than harm, farming. In other cases, the EFU designation may be inappropriate due to the soil quality or the surrounding land development pattern. Case Study 1 is arguably a case in point.

Unfortunately, Measure 37 forces policymakers to ignore the facts of today's agricultural economy. Instead, these decisions are based on agricultural, economic, and social conditions of 30 or 40 years ago—reflected in the land use laws in place prior to the establishment of the state's goals.

### ***Goal 4: Conserving Forest Lands and Protecting the Forest Economy***

Measure 37 has the potential to remove protection from thousands of acres of forest land in the state of Oregon. When Goal 4 was established, Oregon's economy was highly dependent on forestry, and protection of those lands from development was tantamount to protecting the economic base of the state. Prior to the establishment of Oregon's land use system, private forest land conversion occurred at an alarming rate. Since 1953, about 22 percent of the private timberland in Oregon has been developed. Almost all of that development occurred prior to the establishment of the land use system, and the rate of conversion has slowed drastically since the system was established.<sup>2</sup> Measure 37 threatens to once again accelerate the rate of conversion. We know of at least 4,700 acres of forest land currently pending for Measure 37 claims.<sup>3</sup>

Today, the forest economy has declined in importance, primarily because of decreasing supplies of lumber from public as well as private land. Yet the forest sector and wood products manufacturing are still important sources of income in some of Oregon's counties. Measure 37 claims on forest land will further interrupt supplies of timber, and policymakers ruling on Measure 37 claims cannot consider the potential economic impacts of these claims.

Case Studies 8 and 10 both involve forest land, but they are small tracts of land. We have not yet seen Measure 37 claims filed for huge tracts of forest land; these potential claimants may file claims once some of the legal issues surrounding Measure 37 have been resolved. The potential impact of these large tracts will be vastly different from the impacts of the small claims described in this study. Nevertheless, conversion of even relatively small tracts of forestland will lead to reductions in local timber supply. Their impacts should be considered in the normal comprehensive plan amendment process rather than a legal procedure devoid of any consideration of broader impacts.



## ***Goal 5: Protection of Natural Resources, Scenic and Historic Areas, and Open Spaces***

None of these considerations enter into a decision regarding the validity of a Measure 37 claim. If a claim is valid, a policymaking body must decide whether to pay compensation or to waive the relevant regulation. As noted above, of the thousands of Measure 37 claims that have been filed, not a single claim has been paid. Without the funds needed to pay compensation, a county commissioner cannot choose to preserve open space rather than allow the claimant to develop. Cases 1 and 10 are examples of claims in which open space may be lost to the community.

Perhaps citizens of a community should be willing to pay compensation to preserve the open space that they value. But to consider paying compensation, a policy body needs a reasonable estimate of the actual loss to the claimant. However, Measure 37 has provided no guidance on this matter, and requires only that the claimant submit an estimate of the extent of his loss with no requirement for documentation. Important questions have been raised regarding whether these claims are realistic, given that many are based on the scarcity value created by the land use system that has supposedly depleted their use value.<sup>4</sup>

## ***Goal 6: Air, Water, and Land Resources Quality***

Prior to the establishment of Oregon's Statewide Planning Goals and Guidelines, many areas had no zoning. In other cases, zoning was minimal, and was based on the demographic, environmental, and resource conditions at the time and our understanding of the impact of development on air, water, and land quality. By allowing claimants to use land use laws in place decades ago, Measure 37 requires policy makers to ignore what we know today about how development affects these resources. For example, all but one of the cases discussed in this report are located outside urban growth boundaries without access to city sewer services. In some cases, adding residential density in these areas will add additional septic systems. Although the claimants must meet the health and safety requirements for establishing septic systems, these systems may fail in the future, threatening the quality of ground water.

## ***Goal 10: Housing***

All of the Measure 37 claims we examined had the goal of creating residential development. In many cases, the areas in which these claims are located are experiencing development pressure and rising land and housing prices. In the short run, Measure 37 claims may offer an opportunity to increase the availability of housing.

But a closer look at the plans reveals a pattern: almost all of the residential development is for low density residential development, and much of it will probably command prices that will be out of reach for low- or even middle-income residents. For example, in case study 9, the 33 *undeveloped residential lots* are expected to be sold for approximately \$100,000 each. In a county where the median home price is \$111,300 and the median household income is about \$32,000, these lots will not offer affordable housing. Recent calls for additional affordable housing in the county will not be met by this development.

## ***Goal 14: Urbanization: orderly and efficient transition from rural to urban land use***

Several of the case studies in this report demonstrate the damage that Measure 37 can render on our ability to meet this goal. Case 1 clearly demonstrates that Measure 37

claims that lead to suburban style development just outside the urban growth boundary will limit the productivity of bringing these lands inside the urban growth boundary. Similarly, Cases 4 and 9 demonstrate that as these parcels are developed near cities, they may preclude urbanization in the future, as their densities will prevent infill development. In short, they are too dense to be urbanized later, and insufficiently dense to provide the efficiency benefits of urbanization.

## ***Fairness***

Finally, how have these cases addressed the goal supposedly advanced by Measure 37—that of fairness?

Measure 37 restores to its claimants the right to use their land as they could have when they purchased their property. Some of the case studies we examined do illustrate the need to consider basic fairness when land use regulations are changed. Case studies 3 and 6 provide good examples.

But just as changes in the land use laws affected the use of Measure 37 claimants, these claims affect the intrinsic and economic value of neighbors' properties. These neighbors based their investment decisions on the legal framework in place at the time they purchased their properties. For example, in Cases 4 and 7, neighbors who continue to farm may spend more and more of their time addressing residential-agricultural conflicts—conflicts they expected to avoid when they purchased their property in an Exclusive Farm Use zone. If they find that their profitability is harmed by these conflicts, they will not have access to the options given the Measure 37 claimants.

Measure 37 was promoted with the idea that landowners should be compensated for the loss of the use of their land. But the measure provides neither a method for determining the extent of those losses nor a method for financing them. In many cases, the losses estimated by claimants are based on scarcity value that was actually created by the development of the land use system. But with no guidelines for determining the value of claims and no funds for paying them, city councils, county commissions, and state agencies making decisions on Measure 37 claims throughout the state are left with no option but to waive regulations for some classes while keeping them in place for others.

## **Endnotes**

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<sup>1</sup> Oliver, Gordon. "Oregon on the Cusp." *Planning* 70(9) October 2004: 409.

<sup>2</sup> Donnegan, 2001. Change in Private Timberland Area in Oregon. PNW Research Station.

<sup>3</sup> This estimate is based on a very incomplete accounting of Measure 37 claims. We are working toward improving our database of Measure 37 claims, and better data will be available by June 2006.

<sup>4</sup> Plantigna, Andrew J. *Measuring Compensation under Measure 37: An Economist's Perspective*. Oregon State University, December 2004.



# Case Study 1: Development in the Stafford Triangle

## Executive Summary

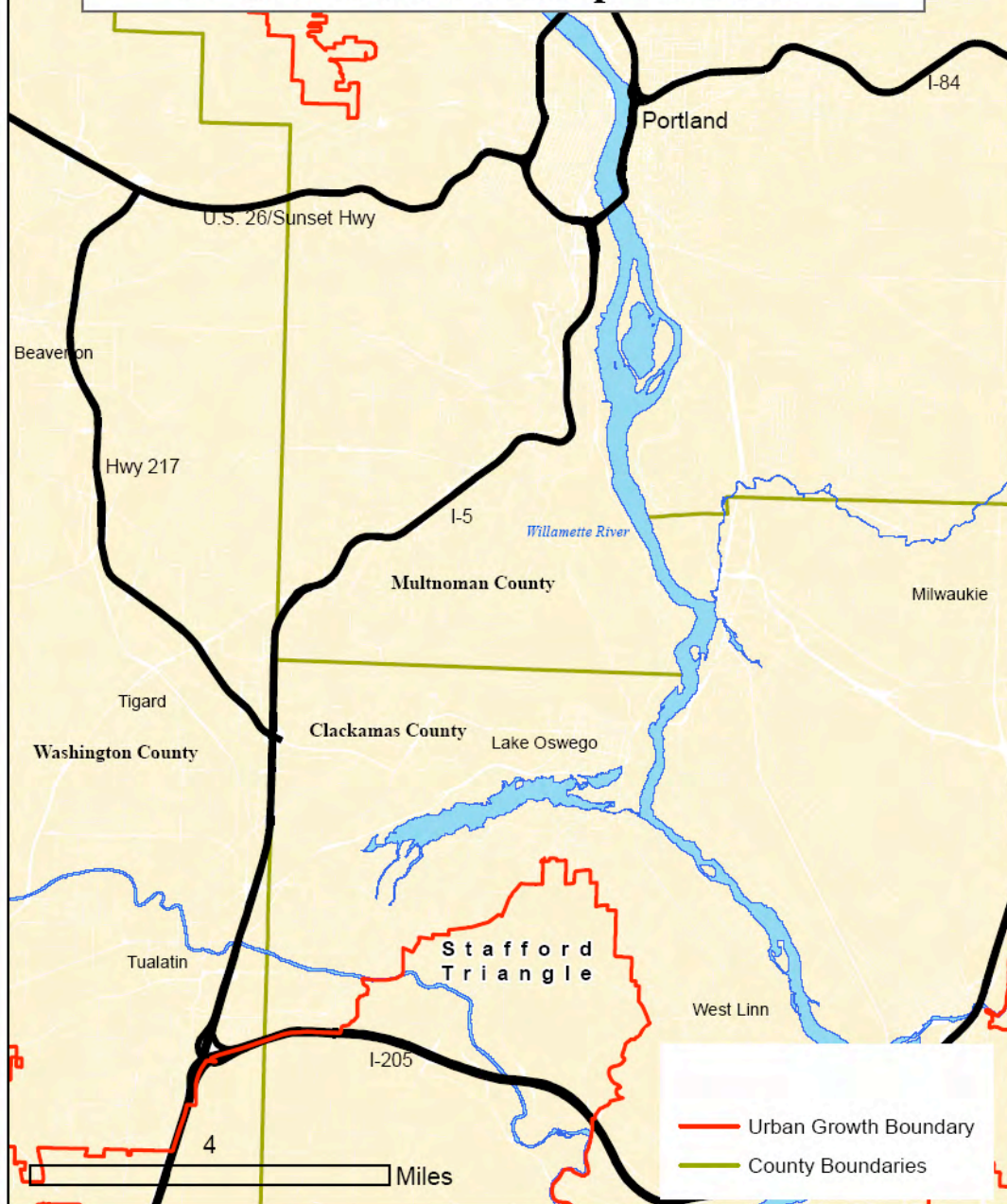
### BASIC FACTS OF THE CLAIM

<b>Claimant:</b>	Charles Hoff	Lauren and Beverly Hartman
<b>Date Acquired:</b>	March, 1977	May, 1952
<b>Location of property:</b>	Adjacent to the west side of Portland's urban growth boundary (UGB) within the Stafford Triangle	About one mile west of Portland's UGB within the Stafford Triangle
<b>County:</b>	Clackamas	Clackamas
<b>Acreage:</b>	53 acres	52 acres
<b>Zoning:</b>	Exclusive Farm Use	Exclusive Farm Use
<b>Proposes Use:</b>	Divide property into one- or two-acre residential lots	Divide property into 26 two-acre residential lots
<b>Monetary Claim:</b>	\$9,600,000 (County) \$11,600,000 (State)	\$2,580,807
<b>Claim filed with:</b>	Clackamas County; State of Oregon	Clackamas County; State of Oregon
<b>Date filed:</b>	Clackamas County—Dec. 6, 2004 State of Oregon—Dec. 30, 2004	Clackamas County—Jan 4, 2005 State of Oregon—March 30, 2005
<b>Claim Status:</b>	Clackamas County – Waiver granted March 30, 2005 State of Oregon—Limited waiver granted June 8, 2005	Clackamas County – Waiver granted April 27, 2005 State of Oregon—Waiver Granted Sept 22, 2005

Each of these claimants seeks waivers of land use restrictions prohibiting division and residential development of land that has been zoned for exclusive farm use (EFU). They each wish to build a subdivision of at least 26 two-acre residential lots. Located within a mile of each other, these claims illustrate similar potential impacts on the Stafford Triangle, a unique rural residential community just outside Portland's urban growth boundary. Together, these two claims comprise ten percent of the land area in the Stafford Triangle; other Measure 37 claims in the Stafford Triangle comprise an additional ten percent of the land area.

The two claimants purchased their property at different times. Lauren and Beverly Hartman acquired their land in 1952, before any land use planning was in place, and both the State of Oregon and Clackamas County have approved the claim. Mr. Hoff purchased his property in 1977; the R-20 zoning in place at that time allowed for the residential development he has proposed. However, because the state had already established statewide land use goals in 1977, the state argued that the R-20 zoning did not reflect the state's goals. Thus, although the county has approved Mr. Hoff's claim, the waiver from the state allows for only several new lots on his parcel.

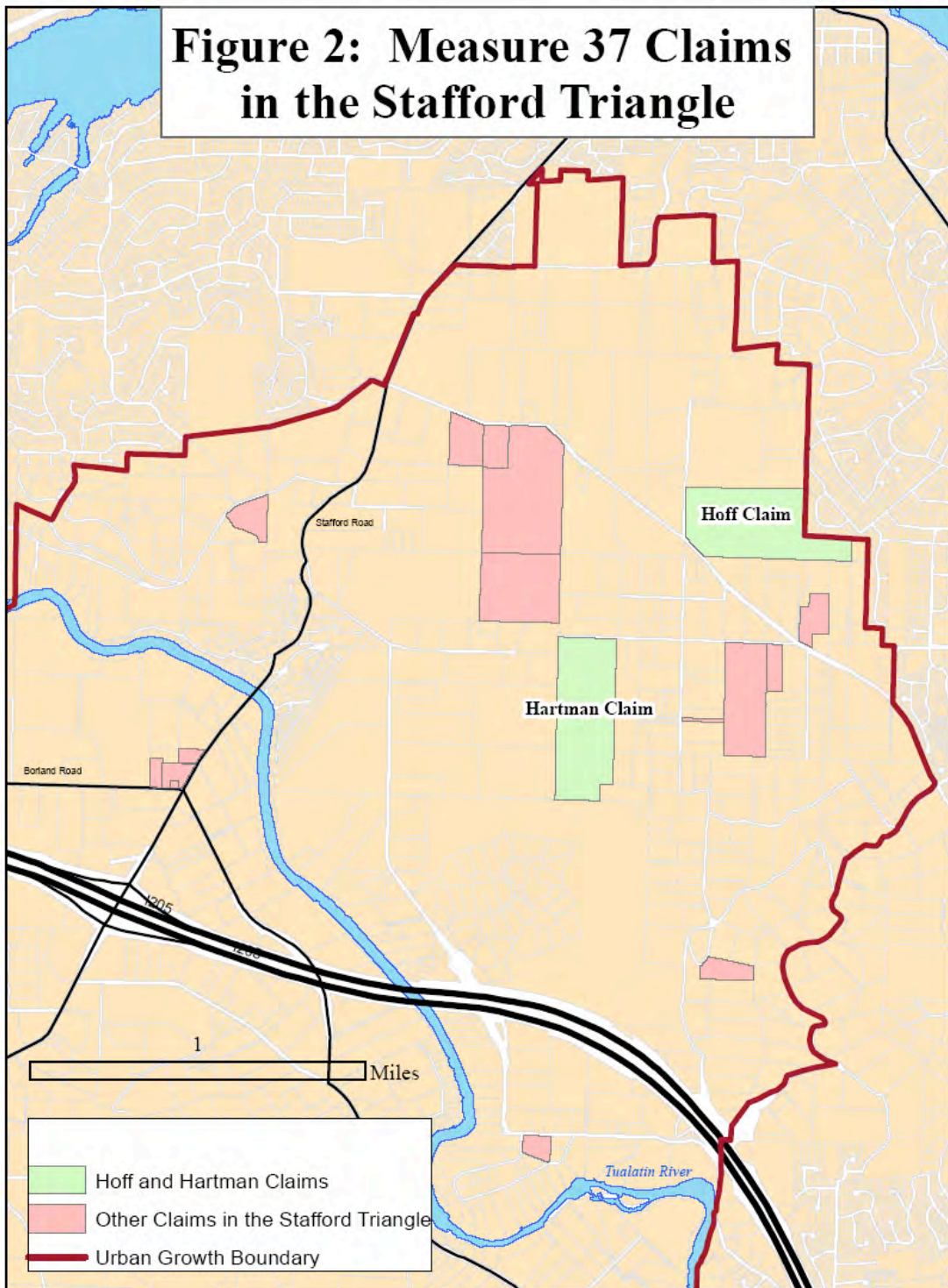
**Figure 1: The Stafford Triangle's Location  
in the Portland Metropolitan Area**



Source: Regional Land Information System (RLIS) data



**Figure 2: Measure 37 Claims  
in the Stafford Triangle**



*Source: Metro map of Measure 37 Claims Filed, July 28, 2005*

# 1. Introduction

This case study involves two geographically related claims, both in the Stafford Triangle area of Clackamas County. This area is just south the urban growth boundary (UGB) and borders the cities of Lake Oswego, West Linn, and Tualatin. The area encompasses approximately 1200 acres, and about 255 acres are now the subject of Measure 37 claims, including the 105 acres represented by these two claims.

The claims illustrate a classic case of development pressure in a semi-rural residential environment. Many who live in the area fiercely defend their lifestyles and feel threatened by the potential impacts of urbanization. In contrast, decisions to leave the Stafford Triangle outside of Portland's UGB have frustrated some large landowners, including the claimants, who want to take advantage of rules that encourage land division and development inside the boundary. The claimants view Measure 37 as an alternative route to division, development, and sale of their land.

This case also illustrates the potential complexity of the impact of Measure 37 claims on future UGB expansion decisions. On one hand, escalating development in the Stafford basin via Measure 37 claims could create more pressure to include the area in the UGB and provide urban services to the many new residents in the area. On the other hand, the disorderly semi-rural residential development pattern that is likely to result from the fruition of claims might discourage inclusion because efficient redevelopment in a more urban pattern would be very difficult.

## 2. Description of the claims

Charles Hoff's Measure 37 claim proposes dividing his 53-acre parcel into a 26-lot residential subdivision of one- or two-acre lots. Currently, Hoff's property is zoned for exclusive farm use (EFU). Hoff filed his claim with both Clackamas County and the State of Oregon.

Clackamas County first zoned the Hoff property R-20 in 1964. R-20 zoning allowed 20,000 square-foot minimum lots subject to septic approval and single-family dwellings as a primary use. The R-20 zoning was still in place when the claimants acquired the property in 1977. On August 23, 1979, Clackamas County rezoned the property EFU in compliance with the statewide land use planning laws, which had become state law on May 29, 1973. The county amended the zoning in 1996. Under today's EFU zoning, the county requires a minimum of 80 acres for new lots on high-value farmland. The county also requires property owners to show \$80,000 in gross sales from agriculture to qualify for a primary farm dwelling on high-value farmland.

Mr. Hoff's Measure 37 claim also states that environmental regulations have reduced the value of his land. The county's staff report indicates that the environmental regulations mentioned in the claim probably refer to the fact that structures on the property will be subject to a minimum setback of 50 feet from Wilson Creek, which runs through the property. However, the staff report indicates that this small setback requirement does not prevent Hoff from dividing his property, and the small setback is unlikely to reduce the value of his property.

In total, Mr. Hoff contends that the inability to develop the property as allowed prior to the EFU zoning has reduced its value by \$9,600,000.

Lauren and Beverly Hartman propose dividing their 52-acre parcel into a 26-lot residential subdivision of two-acre lots for single-family residences. Currently, their property is zoned EFU. Their claim has also been filed with both Clackamas County and the State of Oregon.

The Hartmans acquired their property in the Stafford area in 1952. This property was first zoned R-20 in 1964 but was rezoned to EFU on August 23, 1979. The EFU district was modified in 1996. The Hartmans claim that their inability to develop the property with single-family residences on two-acre lots reduced its value by \$2,580,807.

Together, these 105 acres comprise almost ten percent of the area in the Stafford basin.

### **3. History and Current conditions**

Clackamas County's Stafford Triangle is a classic case of controversial development battles. In a 2003 article in *The Oregonian*, Rick Bella described the enduring controversy: "Every few years. . . somebody looks at the shape of the urban growth boundary and wonders why there is a triangle-shaped 'notch' cut into the border. Logic, they say, dictates that the area should be transformed into a mix of residential and commercial uses to accommodate the growing population in the metropolitan area."<sup>1</sup>

The history of land use regulation in Clackamas County has been difficult and litigious. The state did not acknowledge the county's comprehensive plan until 1981, and that comprehensive plan is one of the most heavily litigated in the state. The difficulty of the acknowledgement process is reflected today in the large number of Measure 37 claims—318 to date—filed in the county.

The Stafford Triangle historically has included a mix of farm and non-farm uses. As a result, when Clackamas County first developed its comprehensive plan in response to the state's planning goals, it included a great deal of exception land because of the existence of rural residential development. Counties designate "exception lands" when "preexisting partitioning and development on otherwise good farm and forest land were found to 'precommit' land to nonfarm or nonforest uses."<sup>2</sup> The Stafford basin reflects an exception-land pattern.

#### **3.1 Current Character and Land use**

As shown in Figure 2, the Stafford Triangle today is a semi-rural area. The parcels in the area range in size from very small to large. Much of the land is zoned Rural Residential Farm/Forest with five-acre minimum lots (RRFF-5), but other parcels are smaller than five acres. These small rural residential parcels are interspersed with larger parcels of EFU land like those owned by Hoff and Hartman.

Although a few limited farms operate in the Stafford Triangle, the area is not intensively farmed. As explained above, the area's history of mixed farm and non-farm uses, and the resulting exception-land pattern have limited agriculture in the area to small operations.

Some have characterized the Stafford Triangle as an aesthetic resource for the region. It is very close to the UGB and the residential areas of West Linn, Lake Oswego, and Tualatin, but because it is not within the UGB, it has not developed to the density around it. Since the 1970s, the development of I-205, the location of employment nearby, and the fact that the area is surrounded by the urban growth boundary has made the Stafford Triangle a desirable location for residential development. The EFU zoning on larger parcels has prevented intensive residential development up to this time.

The relatively dense development surrounding the Stafford basin affects Stafford residents. Stafford and Rosemont Roads intersect the area and connect the cities surrounding the basin. However, because Stafford is not within the UGB, it is not served by urban water, sewer, or stormwater services.



Wilson Creek, a tributary of the lower Tualatin River, runs through the area and on Mr. Hoff's property. A 1997 test of Wilson Creek by Clackamas County showed this water to be cool and clear. More recent development may have already deteriorated fish habitat in this and other nearby streams.

The Three Rivers Land Conservancy has led efforts to acquire and connect open space in the area into a system of trails connecting nearby towns and open spaces. The City of Lake Oswego has also acquired land in the area, including over 70 acres known as Luscher Farm, to hold as open space.

The Hoff and Hartman parcels are two of the larger parcels within the Stafford Triangle. A fir stand once stood on the Hoff property, which was logged many years ago. Since then, vegetation on the property grew into a natural thicket, which was again cleared, evidently in anticipation of the development that would occur once the area was brought inside the UGB.

The Hartman property is a wooded hillside about one mile west of the UGB. The property sits at the end of a low speed dead-end road and is surrounded by low-density rural residential development zoned RRFF-5.

### **3.2 *Neighborhood Conditions and factors triggering claims***

Metro has tried to bring the Stafford Triangle into the urban growth boundary for a number of years. Residents have generally been divided on the issue. Those who own smaller parcels want to maintain their rural lifestyle while owners of large parcels support inclusion in the UGB and the more intense development that decision would bring.

The passage of Measure 37 intensified the tensions between property owners. Currently, property owners in the Stafford basin have filed 318 Measure 37 claims comprising 255 acres—over twenty percent of the total land area. While we cannot determine the validity or development prospects of each of these claims, it is clear that there is significant market pressure for development in this region. The area has access to I-205 and is a relatively easy commute to downtown Portland and the technology job centers in Wilsonville, Beaverton, and Hillsboro. Mr. Hoff states in his claim that he has been offered over \$10 million for his property if the county changes the zoning to accommodate two-acre lots.<sup>3</sup>

The claimants have been interested in developing their land for a number of years. In Hoff's claim letter dated December 6, 2004, he states that he asked for application of zoning change that would allow subdivision into two-acre parcels as early as 1980. He has since been a proponent of including the Stafford basin in the UGB to allow for the change in zoning.

## **4. Probability of Development**

### **4.1 *Probability of claim approval***

Clackamas County approved the Hoff claim, waiving the land use regulations that prohibit Hoff from creating lots for single-family residences, as allowed by the R-20 zoning in effect when he acquired the land. However, the state ruled that although the actual zoning was not changed by the county until 1979, the statewide land use goals ("Goals") that protect farm and forest land had been adopted and would have governed any subdivisions between the adoption of the Goals and local ordinances. Therefore, their decision stated that Mr. Hoff must follow zoning consistent with protection of his property as farmland. In determining what Hoff could have constructed at the time he purchased his property in 1977, the state looked to the EFU Zone later adopted by the county in 1981, which allowed for lots of 20 acres or more. Furthermore,

Clackamas County did not waive any environmental regulations on his property that might be associated with Wilson Creek.

Both Clackamas County and the state approved the Hartman claim. No land use laws were in effect at the time he purchased his property.

## **4.2 Other conditions required for development**

Regardless of the approval of these claims, the claimants' ability to develop the property as proposed is subject to a number of other requirements including:

- Land use decision, e.g. subdivision application;
- Approval of septic, water, and building permits;
- System development charges for emergency services; and
- Approval of transportation access, both for residents and for public safety purposes.

Clackamas County officials have clearly stated that the Measure 37 waivers granted to the claimants waive only those regulations cited in the Measure 37 decision. Thus, each claimant will still be required to file an application for a subdivision and meet current requirements.

These properties, if they are developed as proposed in the claims, will not have access to city services unless they are brought into the urban growth boundary. Thus, they will require wells and septic systems. In this area, two acres is typically sufficient to provide on-site sewage disposal within health standards. Furthermore, these properties are not located in a groundwater-limited area, and probably have basalt aquifers that will not affect surface water flows. Thus, wells and septic will probably not be an obstacle for development of these properties on two-acre lots.

Clackamas County has a concurrency ordinance that requires developers to provide transportation services in time to meet the demands of development. If developed as proposed, both parcels would add traffic to Rosemont and Stafford Roads, which already face adequacy issues. The county would require developers to pay for improvements according to the proportional contribution of the development to traffic inadequacy. Highway access may also be an obstacle, especially for the Hartman claim, because its only access to a highway is via very low speed roads. For both claims, an increase in residential development may require road improvements for access and to ease congestion.

## **4.3 Summary: Probability of development as proposed**

It appears that for the Hartman claim, the major obstacles to development will be transportation concurrency and access.<sup>4</sup>

Given the conflicting rulings from the county and the state, the Hoff claim presents greater challenges. The County waived the regulations, opening the door for development of Hoff's property. However, the state ruled that the claimant can only add one or several new lots and, therefore, residences. Two issues must be addressed in determining the probability of the development going forward as proposed: (1) whether the county or state ruling will govern; and (2) if the state opinion governs, whether the state relied upon the proper provisions in determining what would have been allowed under Goal 3 in 1977.<sup>5</sup>

The future of all Measure 37 claims hinges on the outcome of a case currently before the Oregon Supreme Court. On October 14, 2005, the Marion County Circuit Court issued an opinion in *MacPherson v. Department of Administrative Services*, Case No. 05C10444, holding that Measure 37 is unconstitutional. Preliminary advice by the Oregon Department of Justice to

the DLCD is that waivers issued prior to this opinion may not have any legal effect ([oregon.gov/LCD/measure37.shtml](http://oregon.gov/LCD/measure37.shtml)). County Counsel for Clackamas County has determined that claims approved prior to the *MacPherson* decision are now null and void. The Court has denied any stay pending appeal. Therefore, unless the *MacPherson* decision is overturned, neither Hartman nor Hoff will be permitted to go forward with developing their properties. Oral arguments before the Supreme Court will be heard in January 2006.

## **5 Potential Impacts of Development**

### **5.1 General appearance and character of the neighborhood**

As shown in Figure 2, the Hart and Hoffman claims are two of several Measure 37 claims in the Stafford basin. Each claim in and of itself is unlikely to have a dramatic impact on the neighborhood. Their individual impacts on land use, density, traffic, and water quality and availability are incremental. Taken together, however, the combined impact of these claims will, over time, lead to significant changes in the look and feel of the area. These two claims together comprise about ten percent of the land area in the Stafford Basin. Adding the other claims, about twenty percent of the land in the basin *might* be developed through Measure 37 claims.

Hoff, Hartman, and other claims, if developed according to proposed uses, will certainly have an impact on the land use and density in the immediate vicinity of the claims. In a neighborhood with rural residential lots of one to five acres, as well as EFU land, replacing two 50-acre EFU lots with a fairly dense subdivision of one or two-acre lots will change the character of the area, even though they will not develop at urban densities.

The proposed two-acre lots are smaller than many of the existing parcels. Thus, neighbors will indeed be closer together, which will affect some neighbors' views and their sense of solitude. The greater density will probably increase the noise level, traffic volume, and possibly congestion, depending on the extent to which the concurrency requirements are able to induce the improvements needed to negate the increase in traffic volume.

### **5.2 Environmental/natural resources/recreation**

#### **5.2.1 Water and air**

Because these properties are in unincorporated Clackamas County outside the UGB, they will not be eligible for urban services and therefore will require septic and wells. Neighbors have expressed concern about the impact of septic systems and the impact of new wells in the aquifer. Two-acre lots will probably be allowed given the condition of the soil for the purpose of percolation. Furthermore, these properties are not located in a groundwater-limited area, and probably have basalt aquifers that will not affect surface water flows. But it is unclear whether additional residential wells might affect the water level. Also, additional impervious surfaces in the area as a result of development may contribute to erosion along Wilson Creek.

#### **5.2.3 Wildlife habitat, open space**

Although the Hoff property is probably not significant wildlife habitat today, the wooded condition of the Hartman property suggests that it may be a more significant source of habitat. Residential development on this property may interrupt the greenbelt that provides cover for wildlife, especially deer and songbirds, as they move among food and water sources.

Perhaps more significant is the potential for preserving open space. The Three Rivers Land Conservancy has been working for several years to develop a trail and open space system. This

system is to be developed and maintained by the Three Rivers Land Conservancy in partnership with the National Park Service's Rivers and Trails Program. The community had hoped to expand this system, and one proposed natural area is near the Hartman property. Development now would affect the Conservancy's ability to implement this plan. In fact, it might be easier for the conservancy to protect land in the basin if the area came into the urban growth boundary, which would create an opportunity for using municipal development rules to obtain open space.

### **5.3 *Economic activity/impact***

For the claimants, the main impact would be the ability to gain a significant return on the investment made in their property years ago. Due to considerable market pressures in the area, these properties would both be in high demand for residential development.<sup>6</sup>

The increase in residential density could provide additional revenue for nearby small businesses, such as those to the south in Wanker's Corner. However, the impact is likely to be negligible.

Neighbors hesitated to say how the value of their property would be affected if these claims move forward. Most neighbors noted that in the short run, extensive development near their properties would decrease the value of their property. However, one neighbor noted that with the disappearance of fairly large parcels of land, the scarcity value of larger parcels could rise in the long run. Some neighbors said that the intrinsic value of the property to their quality of life would fall due to the development.

### **5.4 *Local government***

#### **5.4.1 *Costs/infrastructure/public facilities***

The City of West Linn filed letters with Clackamas County expressing concern about the potential for these developments to place additional stress on the emergency services. The development would affect Tualatin Valley Fire and Rescue. Claimants will not be exempt from system development charges because they are not land use regulations that fall under Measure 37. Thus, these additional burdens should be taken care of through the SDCs.

#### **5.4.2 *Planning***

One of the most interesting aspects of these claims is how they may impact the next urban growth boundary expansion process due in 2007.

Some interviewees acknowledged that additional development may mitigate some of the opposition to adding the Stafford basin to the UGB, thus increasing the likelihood that Metro will include the area in 2007. With urbanization already occurring, the theory is that it might be better in the long run to bring the property into the UGB to allow the provision of urban services and development at higher densities.

On the other hand, once the low-density development proposed by these claims has occurred, the potential productivity of bring this area into the UGB will be compromised. It will be very difficult to achieve urban densities and redevelopment will be nearly impossible.

## **6. Summary**

If Measure 37 is not overturned by the Oregon Supreme Court, these two claims will probably result in about 25 to 30 new residences in the Stafford basin. In isolation, this does not seem to

have much of an impact on the character of the area, except for neighbors immediately adjacent to the Hartman property, who will lose their solitude and views. They will also be affected by increased traffic volume.

However, when considered in the context of other claims in the area, these claims demonstrate the impact of the Measure on the future of the region. Together, Measure 37 claims represent over twenty percent of the total land area in the Stafford Triangle. Clearly, if these claims move forward, the population density of this area will increase, limiting our ability to preserve open space for the purpose of recreation.

These claims also might encourage the addition of the area to the UGB. At the same time, the low-density suburban-style development proposed for these areas severely limits the ability to achieve urban densities. Thus, Stafford might become “frozen” at suburban densities that are inefficient and expensive to serve.

## **7. Sources Consulted and Persons Interviewed**

### **Documents Consulted:**

Oregon Department of Land Conservation and Development, Final Staff Report and Recommendation, Ballot Measure 37 Claim M120375, September 20, 2005.

Oregon Department of Land Conservation and Development, Final Order, Ballot Measure 37 Claim M120375, June 2005

Clackamas County Planning Staff Report to the Board of County Commissioners, Measure 37 Claim File Number ZC003-05, April 20, 2005

Oregon Department of Land Conservation and Development, Final Staff Report and Recommendation, Ballot Measure 37 Claim M119114, June 30, 2005.

Clackamas County Planning Staff Report to the Board of County Commissioners, Measure 37 Claim File Number ZC001-04, December 6, 2004

### **Persons Interviewed:**

Dave Adams

Ernest Blatner

Jayne Cronlund, Executive Director, Three Rivers Land Conservancy

Anna Degner

Barton DeLacy, Director, Valuation Services Advisory Group, Cushman & Wakefield of Oregon, Inc.

Janet Higby

Gordon Howard, Senior Planner, City of West Linn

Doug McClain, Planning Director, Clackamas County

Lydia Neill, Principal Regional Planner, Metro

Tom Ortman, County Natural Resource Coordinator, Clackamas County

Richard Stevens

Ron Weinman, Principal Transportation Planner, Clackamas County

Mike McCord, District 20 Watermaster, Water Resources Department, State of Oregon

## Case Study Reviewer:

Hon. Judie Hammerstad, Mayor, City of Lake Oswego

## Endnotes

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<sup>1</sup> Bella, Rick. December 17, 2003. Stafford Triangle is Tempting but Equally Tricky. *The Oregonian*. Page C01. See also Oppenheimer, Laura. April 15, 2004. Metro's Growth Plans. *The Oregonian*. Page A12. See also Oppenheimer, Laura. November 21, 2002. Metro Takes Stafford Out, Will Leave Damascus In. *The Oregonian*. Page D01.

<sup>2</sup> Richmond, Henry R. 1993. Land Use Law Reform Symposium: From Sea to Shining Sea: Manifest Destiny and the National Land Use Dilemma, 13 Pace L. Rev. 327. Accessed online November 2, 2005, <http://www.law.pace.edu/landuse/richmond.html>.

<sup>3</sup> A .3 acre lot within a 1.3-acre three-lot subdivision in the City of Lake Oswego, near the Stafford Triangle with city sewer and water service along Greenbluff Drive is currently listed for \$595,000. See MLS 5055627. However, a Wilson Creek property developer is currently committing to \$2.2 million for a 30-acre parcel of raw land, or about \$75,000 per acre.

<sup>4</sup> Section 11.03.010 of the Clackamas County Code provides for the payment of a Transportation System Development Charge (TSDC) for any new development that "contributes to the need for increased capacity in arterial, boulevard, connector and collector roads" (Clackamas County Code §11.03.010(A)). A TSDC is intended to go towards financing necessary upgrades and not maintenance of existing roads (Clackamas County Code §11.03.010(F)). Although payment is required at the time of issuance of a building permit (Clackamas County Code §11.03.040(A)), the applicant can apply to make payments in "(20) semiannual installments, secured by a lien on the property" subject to development. As indicated by the letter submitted to the Board of County Commissioners by the Planning And Building Department in the Hartman claim, traffic may be an issue with the development of the Hartman's property, as proposed. At a minimum, it appears that Clackamas County will require that the Hartman's provide a traffic study to determine the impact of traffic on the surrounding roads. It is not possible to determine at this point how much, if any, a TSDC would be imposed and the ability of Hartman to pay such a cost. However, there is another possible outcome if it is found that the increased traffic caused by the development would result in an adverse impact on public safety, a decision not determined by the county's ruling in the Hartman case. If it is determined that the development would be a threat to public safety, the development may be exempt from Measure 37, thus precluding the development. Without building and development plans, it is impossible to determine whether zoning or building codes will impede the development. Possible impediments include ability to provide access to a street (Clackamas County Zoning and Development Ordinance §901.02) and compliance with grading requirements (Clackamas County Code §§9.03.010 et seq.)

<sup>5</sup> The question of whether a county code or Goals govern was addressed by the Courts in the late 1970s and early 1980s, immediately after the adoption of the Goals. Problems arose due to the lapse in time between the adoption of the Goals and local jurisdiction adoption of plans and zoning regulations that conformed to the Goals. A hierarchy of regulations was established for subdivisions: subdivisions must be consistent with zoning regulations, which must be consistent with comprehensive plans, which must, in turn, be consistent with the Goals. See *1000 Friends of Oregon v. Benton County*, 32 Or App 413 (1978). Where local jurisdictions had not yet adopted plans in conformity with the Goals, the Goals were directly applicable to divisions of land. See *Meeker v. Board of Commissioners*, 36 Or. App. 699, 585 P.2d 1138(1978); *1000 Friends v. Benton County*, 32 Or. App. 413, 575 P.2d 651, rev. denied, 284 Or. 41, 584 P.2d 1371 (1978); *Alexanderson v. Polk County*, 289 Ore. 427, 434, 616 P.2d 459, 463 (1980); *Jurgenson v. Union County*, 42 Or. App. 505, 509, 600 P.2d 1241 (1979); see also *South of Sunnyside Neighborhood League v. Clackamas County Comm.* 280 Or. 3, 269 P.2d 1063 (1977). Goals were determined to apply to both subdivisions (division of land into four or more lots) and parcels (division of land into two or three lots). In determining what would have been allowed under Goal 3 in 1977, the state looked to the Clackamas County EFU Zone adopted in 1981, which created a standard that lots be at least 20 acres in size. However, in 1975, the criteria for land divisions of exclusive farm use zones under state law required review by the county of any division "resulting in the creation of one or more parcels of land of 10 or more acres in size". ORS 215.263(1)(1975 ed.). Thus, question remains as to whether the appropriate standard is ten acres or twenty acres. However, given that Hoff did not raise this issue before the state, he should be foreclosed from raising this in any appeal. Thus, the probable outcome is that Hoff would be restricted to creating one new lot, for a total of two new residences, as opposed to the 26 lot subdivision allowed by the waiver of the County regulations.

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However, the ability to market these units depends on the transferability of the right. Most lenders agree that it will be difficult to obtain financing for any home that would be considered a nonconforming use under a new owner.

# Case Study 2: The Role of Community Planning in North Portland

## Executive Summary

### BASIC FACTS OF THE CLAIM

<b>Claimant:</b>	Augustine and Lorraine Calcagno
<b>Date Acquired:</b>	1983 and 1990
<b>Location of property:</b>	8506-8514 and 8522 N. Edison Street in North Portland
<b>County:</b>	Multnomah
<b>Acreage of property:</b>	0.44 acre
<b>Zoning:</b>	R1d (Medium Density Multi-Dwelling with a design overlay), which allows for a maximum of 19 units on the property
<b>Proposed Use:</b>	Develop as allowed under RH zoning, up to 75 units
<b>Monetary Claim:</b>	\$500,000
<b>Claim filed with:</b>	City of Portland
<b>Date filed:</b>	March 18, 2005
<b>Claim Status:</b>	City issued order to not apply the current R1 zone to the property.

Augustine and Lorraine Calcagno claim that zoning imposed on their property in 2004 reduced the value of their property by \$500,000. The two contiguous parcels in the St. Johns neighborhood of North Portland total .44 acres. The current zoning allows for a maximum of 19 developable units on the property. The zoning in place at the time the Calcagnos acquired the property would have allowed for up to 75 units.

The City of Portland adopted St. Johns Neighborhood Plan in May of 2004 after an extensive study by a citizens' working group and a great deal of input from the neighborhood's residents. The aim of the plan was to improve the vitality and identity of the community over the long term.

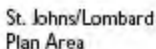
Although the higher density zoning had been in place for many years, Mr. Calcagno had never attempted to develop to that density prior to the enactment of the St. Johns plan. The property has not been well-maintained and there is frequent turnover of tenants.

Mr. Calcagno's waiver has been granted by the City of Portland. If he pursues his plans for development, a high-rise building in that location will be out of character with the remainder of the neighborhood. This building will block the views that the plan tried to preserve with step-down hillside development. Residents also fear that the uncertainty created by Mr. Calcagno's claim will inhibit other investment in the area, preventing the implementation of the plan.

Residents who participated in the development of the community plan are disappointed that a single individual, through a Measure 37 claim, could negate decisions made by a citizens committee through a public process. They fear that the claim will inhibit citizens from participating in community efforts in the future.



This case study involves a claim resulting from a recently adopted community plan for the St. Johns area of North Portland. This claim is unique in that it resulted from a recent downzoning within an urban area. It also illustrates a case in which a community plan designed to improve the vitality of the entire neighborhood is at odds with an individual's perceived economic interests. In this case, Measure 37 allows the individual's interest to override the community's vision as expressed through the plan. In the absence of funds for compensating the landowner or even to explore the actual economic injury to the claimant, the claim may, to some extent, compromise the execution of the community's vision.



Augustine and Lorraine Calcagno claim that land use regulations have decreased the value of their North Portland property by \$500,000. The property in question involves two contiguous parcels totaling .44 acre (19,400 square feet). Mr. Calcagno acquired the first parcel in 1983 and the second in 1990. He transferred 50 percent of his ownership in both properties to his wife, Lorraine, on October 5, 1998. Both Augustine and Lorraine transferred their interests in the properties to a Limited Liability Corporation (LLC) in their names on January 11, 2000.

The change in zoning occurred after the City Council adopted the St. Johns/Lombard Plan on May 26, 2004 and it became effective on July 10, 2004. The Calcagnos requested restoration to the higher density zoning and removal of the design overlay or compensation of \$500,000. They based their estimate on the assumption that the property can be sold for \$10,000 per allowed unit; thus, the loss of 56 units brought him to approximately \$500,000. They also asked that the waiver apply to the land itself rather to them personally, so that they could sell the land to a developer with the right to develop at the higher density. The Calcagnos did not propose a specific development as part of their claim.

### **3. History and current neighborhood conditions**

St. Johns officially incorporated as a city in 1865. The City of Albina annexed it early 1891. Later that year, the entire area was consolidated into the city of Portland. But St. Johns again became an independent city on February 19, 1903. At that time, it had 2000 residents. St. Johns rejoined the City of Portland in 1915 after an annexation vote.

St. Johns has grown much more slowly than the City of Portland. From 1980 to 2000, the population of Portland grew by 38 percent, but the population of the St. Johns/Lombard area grew only 8.3 percent. All of that growth occurred after 1990, when development had pressured other areas of the city.

The Calcagno property is located in the Cathedral Park section of St. Johns, the smallest of the four St. Johns neighborhoods. The neighborhood sits on a hill that slopes toward the Willamette River and offers views of the Willamette River, the spectacular St. Johns Bridge, and Forest Park. The area contains a mix of housing types as well as some industrial uses on the riverfront. The housing includes relatively low-density multi-dwelling structures mixed with older bungalows and newer townhouses. Only one structure in the entire neighborhood has the scale and height allowed by an RH zone. The neighborhood has a number of steeply sloped streets and many streets lack sidewalks and other improvements.

The Portland City Council enacted the St. Johns/Lombard Plan in May 2004. The city developed the plan with significant input from a citizens' working group. The plan's development took several years and obtained neighborhood input through an open house, a visioning workshop, neighborhood walks, urban design workshops, and community meetings.

The plan claimed a number of goals, with an overall objective of "improving the vitality and identity of the community over the long term."<sup>3</sup> The residents who participated wanted to see positive change in their neighborhood, and they viewed the plan as a catalyst for that change.

Despite having been zoned RH for many years, Mr. Calcagno had never attempted to develop to that density prior to the enactment of the St. John's plan. Nevertheless, he opposed the downzoning of his land and appeared before the Planning Commission to protest the plan. He claims that he had always planned to develop the property at higher densities but was waiting for the market to develop.

### **4. Probability of Development**

The City of Portland's City Council approved the Calcagnos' request to restore the RH zoning in place at the time they acquired the property. The rejected both their request to remove the design overlay and their request to deem the waiver transferable.

The city's staff report states that the change in zoning implemented by the St. Johns/Lombard Plan has "more likely than not" reduced the fair market value of the property.<sup>4</sup> However, testimony during the Measure 37 claim hearing indicates that neighbors doubt whether the change in zoning did actually reduce the value of the property. One member of the city council requested a more detailed appraisal than that provided by the claimant. He felt that if the value had not actually fallen, or if it had only fallen a small amount, payment might be appropriate in lieu of waiver. The city council rejected this proposal.

Mr. Calcagno must pursue a design review process before he can develop his property and he will need to comply with the design overlay. He must be the owner of the property when he submits the design proposal. Mr. Calcagno has expressed reluctance to develop the property himself, so whether he actually pursues the high-density development the waiver allows is questionable.

If he does develop the property at RH density, he probably will find a market for the newly created housing. Other RH-density projects have been proposed for the area, both prior to and since the St. John's plan went into effect. For a variety of reasons, including neighborhood opposition and the rezoning implemented by the plan, none of these projects have been built.

However, On October 14, 2005, in a case entitled "[MacPherson v. Department of Administrative Services](#)," the Marion County Circuit Court ruled that Measure 37 is unconstitutional on several grounds. Technically, the court's decision only applies to those governmental bodies (Marion, Clackamas, Washington and Jackson counties and the State) that were parties to the decision. The City of Portland was not a party to the case. However, if the Oregon Supreme Court upholds the ruling, Measure 37 waivers will be ruled invalid, and Mr. Calcagno will not be allowed to pursue his development. The Supreme Court will hear Oral Arguments in early January.

## **5 Potential Impacts of Development**

### ***General Appearance and Character of the Neighborhood***

The St. Johns/Lombard Plan altered the zoning in the Cathedral Park neighborhood to promote positive change. The community members felt that the properties were underutilized and that more sensible, flexible zoning would encourage development at densities that would be consistent with the neighborhood character while providing the moderate increase in density needed to support the town center. These community members believed the RH zoning to be inconsistent with the character of the neighborhood and that it would discourage investment because of the high minimum density required.

Most of the neighbors interviewed about the Calcagno claim noted changes to Cathedral Park's character as the primary concern raised by the Calcagnos' claim. These neighbors know that other properties in the RH zone were downzoned, raising concerns that more claims may be forthcoming. These claims, if developed at RH density, would impact on the character of the neighborhood in the same way as the Calcagno's development.

Neighbors also expressed concern about the potential impact of Mr. Calcagno's claim on their scenic views. The city downzoned properties in Cathedral Park in part to encourage development that stepped down the side of the hill, preserving views. A *Portland Tribune* article about the claim indicates that residents worry that a tall building like that proposed by the Calcagnos will impact the shade, sun, and views across the Willamette River to Forest Park.<sup>5</sup> Our interviews reflected these concerns about views.

Some neighbors also expressed concerns about traffic. The St. Johns/Lombard Plan states that the plan area's transportation system is generally well-served and that most intersections will provide adequate levels of service for the next 20 years. However, the city developed the plan so that increases in density balanced against decreases elsewhere. The plan does not capture the net increase in units that will result from Calcagno's development. Moreover, the neighbors expressed concerns about the impact of more cars locally, such as the effect of adding parking for the number of residents who would be housed in such a large building. Residents in the immediate vicinity of the building could experience negative traffic and parking impacts if the development does not address these effects.

### ***Economic Impact/Property Values***

As already noted, the City of Portland's staff report about the Calcagno's claim indicates that it is likely that the R1d zoning has decreased the value of the claimed property. However, the city

lacked resources to conduct a detailed analysis. If it is true that the downzoning decreased the value of the property, the Calcagnos will benefit if, ultimately, they can develop the parcel at the higher density. Mr. Calcagno has stated that he intended to develop at the intensity allowed by RH zoning when he purchased the property and that the purchase price of the property reflected that potential.

The St. Johns/Lombard plan aimed to focus the most intense multifamily development near business operations. Mr. Calcagno's plans would add density away from the core. Whether this would have a significant impact on the local businesses is questionable.

Several neighbors are worried that if Mr. Calcagno develops as proposed, their property value may decline because of the loss of view. Others cite the loss of certainty about the future of the region as a negative factor in property values. They fear that Mr. Calcagno's success would encourage other claimants to apply, leading to even greater density in the area. The uncertainty created by the possibility of additional claims might, they fear, further diminish their property value.

### ***Plan implementation***

The St. Johns/Lombard plan sought to create positive change by encouraging investment in the community. One of the potentially negative impacts of the Calcagno's claim, and of Measure 37 in general, is the uncertainty that it creates and the implications for investment in the area.

### ***Citizen involvement***

Testimony during the city's public hearing about the claim indicate that it already caused members of the St. Johns community to question why they invested significant time and energy into the community planning process. These community members feel the development proposed by the Calcagno's claim works against the goals of the plan and negates the work of the community. Although a single high-rise building will probably have only a small impact on the plan's overall implementation, these citizens express frustration that a single individual pursuing his economic self-interest can nullify years of work by a group of involved citizens working in the public interest.

It appears that one impact of the claim might be that it will be more difficult to engage community members in the St. Johns neighborhood in the future. While this impact would certainly affect land use and transportation planning efforts, it could also spill over to other issues, such as stopping crime or planning a community festival.

## **6. Summary**

Mr. Calcagno's claim has been approved by the City of Portland. This approval occurred without a detailed analysis of the actual impact of the *entire plan* (rather than just the downzoning of the individual property) on the value of the property. It is possible that the execution of the St. Johns Plan actually encouraged a more robust housing market and increased land values.

Despite the approval, it is unclear whether Mr. Calcagno will execute plans for developing up to 75 units at that site, the maximum allowed under RH zoning. He will have to pursue a development application and a design review. Also, he will not be able to transfer the zoning to a new owner. He has stated that this will prevent him from pursuing his plans.

If Mr. Calcagno does move ahead with the development, the building would be out of character with the rest of the neighborhood and may interfere with views of some neighbors. The

subsequent increase in density and view interruption are counter to the intent of the St. John's plan and the downzoning of the property.

The uncertainty surrounding this claim and other potential claims in this neighborhood affect the investment climate and, therefore, may interfere with the implementation of the St. Johns plan.

Our discussions with neighbors indicate that they are most disappointed that a single individual, through a Measure 37 claim, could negate decisions made by a citizens' committee through a public process. They fear that this will inhibit citizens' participation in the future.

## **7. Sources Consulted and Persons Interviewed**

### **Documents Consulted:**

St Johns/Lombard Plan, Ordinance No. 178452; Resolution No. 36219, City of Portland, Bureau of Planning, <http://www.portlandonline.com/shared/cfm/image.cfm?id=65700>

City of Portland, Ballot Measure 37 Claim for Compensation, Staff Report and Recommendation, Claim number 05-117098 PR, August 12, 2005; <http://www.portlandonline.com/shared/cfm/image.cfm?id=96464>

### **Persons Interviewed:**

August Calcagno

Larry Stein

Jim Barnas

Phil Nameny, City Planner, City of Portland

Chris Dearth, Measure 37 Program Manager, City of Portland

Erik Palmer, Land Use Chair, St. Johns Neighborhood Association

Paul Maresh

### **Case Study Reviewer:**

Amanda Fritz

## **Endnotes**

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<sup>1</sup> With bonuses allowed, the maximum density for this zoning is as high as 65 units per acre.

<sup>2</sup> Ballot Measure 37 Claim for Compensation City of Portland Staff Report and Recommendation. August 12, 2005. Accessed online October 10, 2005, <http://www.portlandonline.com/bds/index.cfm?c=35926>.

<sup>3</sup> St. Johns/Lombard Plan: A Cooperative Planning Effort for the Peninsula. June 2004. City of Portland, Oregon, Bureau of Planning. Accessed online October 10, 2005, <http://www.portlandonline.com/shared/cfm/image.cfm?id=65700>.

<sup>4</sup> Ballot Measure 37 Claim for Compensation City of Portland Staff Report and Recommendation. August 12, 2005. Accessed online October 10, 2005, <http://www.portlandonline.com/bds/index.cfm?c=35926>. Page 3.

<sup>5</sup> Hamilton, Don. April 22, 2005. Measure 37 Tensions Loom Large in St. Johns. *Portland Tribune*.

# Case Study 3: Small Residential Subdivision in the Heart of Pear Orchards

## Executive Summary

### BASIC FACTS OF THE CLAIM

<b>Claimant:</b>	Joe and Nadine Holt
<b>Date Acquired:</b>	January 11, 1966
<b>Location of property:</b>	Highway 35 and Paasch Drive; Township 2N, Range 10E, Section 12, Tax Lot 900
<b>County:</b>	Hood River
<b>Acreage of property:</b>	18.69 acres
<b>Zoning:</b>	Exclusive Farm Use
<b>Proposes Use:</b>	Ten residential lots ranging from 1.5 to 3 acres with nine new single family dwellings
<b>Monetary Claim:</b>	\$1,122,000
<b>Claim filed with:</b>	Yamhill County and the State of Oregon
<b>Date filed:</b>	Hood River County—January 24, 2005; State of Oregon—January 26, 2005
<b>Claim Status:</b>	Yamhill County – Waiver granted June 6, 2005 State of Oregon – Waiver granted July 21, 2005

The goal of this claim is to divide this 19-acre lot into ten residential lots. This would require removal of the exclusive farm use zoning currently in place in favor of the R-2 (multiple Family Dwelling District) zoning that was in effect at the time the claimants purchased the property in 1966.

The Holt property is on the Mt. Hood highway (US 35), with easy access to the City of Hood River, four miles away. It is in an area that contains some large orchards as well as rural residential property. A portion of the land is currently planted in apples and pears.

The county and state have both approved the claim, stating that the Holts can develop as proposed, but must comply with any of the law's provisions that were in place in 1966. However, because Marion County Circuit Court has ruled in *MacPherson v. Department of Administrative Services*, that Measure 37 is unconstitutional, the waiver will be invalid unless the supreme court overrules the circuit court.

# 1. Introduction

This case study involves a claim on about 19 acres of land zoned for Exclusive Farm Use (EFU) in Hood River County near the city limits of Hood River. When Measure 37 passed, many identified Hood River County as a place where the impact of the measure could be significant. The county, which is home to productive orchards and farms, is facing stiff development pressures. The agricultural community is divided on the issue of Measure 37; while some farmers fear the potential loss of farmland and conflicts between agricultural and residential uses, others desire the flexibility to convert their exclusive farm use land to residential uses.

The Holt's claim proposes dividing the 19-acre lot into ten residential lots.<sup>1</sup> The proposed residential subdivision is relatively small. However, its location neighboring productive orchards raises concerns about the potential conflict between residential and agricultural uses and the future of agriculture in the county.

## 2. Description of the claim

Joe and Nadine Holt claim that land use regulations have decreased the value of their 19-acre property by \$1,122,000. The property is currently zoned for Exclusive Farm Use, which prohibits dividing the property and adding residences. The Holts acquired the property in 1966, when it was zoned R2. The R2 zone allows for two-acre lots with single-family dwellings and multi-family dwellings of up to four units. The Holts plan to divide the property into ten residential lots and intend to continue to live on the property.

## 3. History and current conditions

The Holt's property sits on a ridge between the Mt. Hood Highway (US 35) and a rail line. It is currently zoned for Exclusive Farm Use and a portion of the land is planted in apples and pears. The Holts personally work the apple orchard, but they lease the pear orchard to a neighbor who owns an adjoining orchard. The Holts' home is on the property, which also hosts a single-wide manufactured home, a double-wide manufactured home, two garages and a few agricultural buildings.

The Holts' property is near other working orchards on parcels of about the same size as the Holt property or larger. These parcels, which are as large as 136 acres, are also zoned Exclusive Farm Use. Several oddly-shaped one-half to ten-acre parcels contain small farms and rural residences or fit together into very large orchards. For example, a 515-acre orchard made up of at least five smaller parcels sits about a mile northeast of the Holt property.

### ***Hood River development pressures***

The Holt property is on the Mt. Hood highway (US 35), with easy access to the City of Hood River, four miles away. Hood River is a small town about sixty miles east of Portland on the Columbia River. Known for its fruit orchards, Hood River County today is a resort community. With easy access to Mt. Hood and the Columbia River Gorge National Scenic Area, the city's special location has generated a tremendous growth in tourism.

With a population of 6,230 in 2004,<sup>2</sup> the town has experienced a moderate population growth rate of 35 percent since 1990. This statistic, however, does not fully reveal the extent of development pressure felt within this small town. Because of its popularity among tourists, some of the city's homeowners are not full-time residents, but live elsewhere for most of the year and may rent their property to tourists.

At the same time, much of the county's land is not available for development. The county has a small land area and about 75 percent of this is owned by the government.<sup>3</sup> Of the land in private ownership, the county restricts much of its use because the Urban Growth Boundary around the City of Hood River is drawn close to the city limits.

### ***Circumstances Leading to the Claim***

When the Holts purchased their property in 1966, part of the land hosted a mobile home park with five mobile homes while orchards occupied the other part of the land. The zoning allowed for multifamily dwellings on the property and Mr. Holt planned to further develop the mobile home park but wanted to proceed slowly. At one time his mother lived in one of the mobile homes on the site.

In 1973 the state enacted the land use planning system, which established standards for dividing property and building new residences. In 1975, Statewide Planning Goals 3 and 14 became effective. Goal 3 generally requires agricultural land to be used for farm uses and Goal 14 requires land outside of urban growth boundaries to be used for rural uses. In 1980, the state acknowledged Hood River County's comprehensive plan, meaning that it conformed to the state's rules. In 1993, the state passed regulations requiring eighty-acre minimum lot sizes for new lots or parcels located in EFU zones.

These regulations have restricted Mr. Holt from making improvements to the areas of his property that have, in the past, been used for residential uses. For example, he tried at one point to upgrade one of the mobile homes by replacing one home with a larger mobile home, but the county denied his request. Moreover, the land use regulations have kept him from dividing the land and developing new residential dwellings.

## **4. Probability of Development**

The state and county both have approved the waivers requested by the claimants. Both of the final reports state that the relevant sections of state and county code are waived except those that were in effect at the time the Holts acquired the property. Thus, the Holts must meet the requirements of the R-2 zone in the 1965 Zoning Ordinance #2. This ordinance had a minimum lot size of 7,500 square feet if served by public sewer, or 10,000 square feet otherwise. It allowed for single-family, two-family, or multi-family units; the lot area must be increased by 2,500 square feet per dwelling unit on two, three, or four-family units, and 2,000 square feet for each unit over four.

The Holts must follow the county's normal and current development procedures, including filing a land use application. No public sewer is available at the site; therefore, they will need to show that the land can support individual septic systems. Generally, 2-acre lots support individual septic systems. While the Holts will need to assess the land's individual characteristics, they may need to scale back the development to comply with this requirement. The property is within a water district and the new properties would connect to the water supply. The Holts hired a private traffic engineer who did not anticipate problems with access to the highway, but they will need to develop an interior road network for the subdivision since the subdivision will only have a single access to the highway.<sup>4</sup>

In addition, the Holts will need to show that their proposed development complies with the City of Hood River's zoning ordinance that was in place in 1966. As already noted, the property was zoned R-2 in 1966, which allowed for single family, two-family, or multi-family residential development as a permitted use. The ordinance defines some criteria for development, including the following:



- Setback requirements of 20 feet in the front and rear yards and 5 feet on the side yards;
- Height maximums of 35 feet or 2 ½ stories; and
- Lot coverage maximums of 30 percent of the lot area.<sup>5</sup>

Today, many subdivision ordinances allow a local government to deny development because it does not conform to the character of the surrounding community,<sup>6</sup> but these types of criteria are absent from the 1966 ordinance. Therefore, it is unlikely that the 1966 ordinance will limit the Holts from developing their property, although it is possible that the county could constrain the development using the height, footprint, and setback requirements in the ordinance, as well as the health and safety requirements related to septic systems.

On October 14, 2005, the Marion County Circuit Court issued an opinion in *MacPherson v. Department of Administrative Services*, Case No. 05C10444, holding that Measure 37 is unconstitutional. Preliminary advice by the Oregon Department of Justice to the DLCD is that waivers issued prior to this opinion may not have any legal effect ([oregon.gov/LCD/measure37.shtml](http://oregon.gov/LCD/measure37.shtml)). The Court has denied any stay pending appeal. Therefore, unless the *MacPherson* decision is overturned, the Holts will not be permitted to develop their property under Measure. Oral arguments before the Supreme Court will be heard on January 10, 2006.

## 5. Potential Impacts of Development

If the Holts move ahead with their development application as planned, they will split their 19-acre parcel into ten parcels and build nine new houses (the Holts plan to continue to live in their current house). The proposal would eliminate the two existing mobile homes and end farming on this parcel.

In terms of traffic, noise, or crowding, there will be very little impact on the quality of life of those who currently live on or near the Holt's property. Those most affected will be the Holts, who will share their land with additional residents.

The farmer who currently leases the Holt's pear orchards will shoulder the immediate impact of this claim. His loss of that acreage may affect the profitability of his operations. Other neighbors, including those who work orchards, do not express serious concern about the conversion of this acreage from orchards to residential property. Nonetheless, the claim does illustrate the creeping loss of orchards in the context of economic trends that have forced smaller producers out of business, consolidating their holdings with a few large producers.

The environmental impact is likely to be minimal since the land already has several residences. However, the development will require additional septic systems and will increase the amount of impervious surface. Both will have an incremental impact.<sup>7</sup> That incremental impact should be considered in the context of the total acreage affected by Measure 37 claims.

### ***Economic impact***

For the Holts, this claim represents their opportunity to realize the residential development value of their land and continue to live on the land without farming it. As the farm economy in Hood River County has matured, the size of a viable orchard has grown. Estimates vary, but most farmers say that it takes more than 20 acres, perhaps up to 65 acres, to be able to break even on an orchard. To support a family, they say, you need 150 to 200 acres. Not only is the Holts' parcel relatively small, it also has existing buildings that would need to be removed for the entire parcel to be farmed.

Nevertheless, some farm advocates are concerned about the conversion of any land out of orchards. The farming community seems split between farmers who support the existing land use system, and those that prefer more flexibility. Many farmers express concerns about the conflict between agricultural and residential uses. These conflicts occur whenever a non-farmer moves to a farm area and expresses concerns about normal agricultural practices such as spraying. Furthermore, spot zoning such as that resulting from Measure 37 claims introduces uncertainty that may prevent investment by the agricultural community.

### ***Local government***

The claim is representative of a broader impact of Measure 37 on the county's ability to plan for its future. Hood River County is struggling with development pressures and threats of Measure 37, if it stands, may discourage any planning action that leads to downzoning or otherwise limiting land uses. .

## **6. Summary**

If the Oregon Supreme Court overturns the Circuit Court's decision that Measure 37 is unconstitutional, the Holts' claim will likely lead to residential development on this 19-acre EFU parcel. Although health and safety requirements related to septic systems may force the Holts to increase the lot size and thereby reduce the number of residences, they will likely gain approval for at least seven residences. The development will take the land out of orchard, increase the impervious surfaces, and add a minimal amount of traffic along the Mt. Hood highway. .

Although the impact of this single claim seems minor, at least 33 claims have been filed for parcels in Hood River County, many of them on EFU land.<sup>8</sup> Thus, the Holt claim represents only one of many claims that will comprise the cumulative effect of Measure 37 in Hood River County and in Oregon. Together these claims will affect how and where the community grows, the future of the county's orchard economy, and the provision of infrastructure.

## **7. Sources Consulted and Persons Interviewed**

### **Documents Consulted:**

Oregon Department of Land Conservation and Development, Final Staff Report and Recommendation, Ballot Measure 37 Claim M119476, July 19, 2005.

Hood River County Planning Staff Report to the Board of County Commissioners, Measure 37 Claim File Number 05-M004.

Hood River County Board of Commissioners, Order #2005-03.

### **Persons Interviewed:**

Roger Shock, Chair, Hood River County Commission

Joe and Nadine Holt

Ralph Smiley, President, Hood River County Farm Bureau

Don Nunamaker, Realtor, Hood River

Patrick Moore

### **Case Study Reviewer:**

Gil Sharp

## Endnotes

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<sup>1</sup> The Holts' original claim requested only seven lots, and this is the claim that was acted on by the state of Oregon. However, they revised their claim with Hood River County to a request for ten lots. The change makes little difference to the ruling on the claim because the law in 1966 would have allowed a 10,000 square foot minimum lot size.

<sup>2</sup> Cai, Qian. *2004 Oregon Population Report*. Population Research Center, Portland State University, March 2005. Accessed at [http://www.pdx.edu/media/p/r/prc\\_2004\\_Population\\_Report.pdf](http://www.pdx.edu/media/p/r/prc_2004_Population_Report.pdf) on November 14, 2005

<sup>3</sup> About 74 percent of the county's land is in public ownership, and about 8 percent of the private land in the county is zoned for development. The remaining 92 percent is zoned for resource use or for floodplain or geologic hazards. Of this 92 percent, 33 percent is zoned for Exclusive Farm Use and 50 percent is zoned Forest Lands. Source: U.S. Department of Energy and Bonneville Power Administration. Hood River Fisheries Project Draft Environmental Impact Statement (DOE/EIS-0241). Accessed online November 14, 2005.

<sup>4</sup> Ray, Michael, Senior Planner, Oregon Department of Transportation. May 10, 2005. Letter to David Meriwether, Hood River County Administrator, regarding the Holt Measure 37 claim.

<sup>5</sup> Hood River County Staff Report for Joe R. and Nadine Holt's Measure 37 Claim #05-M004. June 6, 2005. Attachment A, County of Hood River Permanent Zoning Ordinance No. 2, Adopted by the Hood River County Board of Commissioners, September 8, 196\_.

<sup>6</sup> *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440 (2000) upheld the local government practice of using code criterion requiring that a proposal be shown to be compatible with the surrounding area and to not have more than a minimal impact on the livability and appropriate development of the surrounding area. For an example, see City of Hood River Administrative Code Title 17, Chapter 06, Section 030 (Approval Criteria).

<sup>7</sup> The U.S. Environmental Protection Agency's New Development Management Measure for Urban Runoff states, "During the development process, both the existing landscape and hydrology can be significantly altered. As development occurs, soil porosity decreases; impermeable surfaces increase, channels and conveyances are constructed, slopes increase, vegetative cover decreases, and surface roughness decreases. These changes result in increased runoff volume and velocities, which may lead to increased erosion of stream banks, steep slopes, and unvegetated areas. In addition, destruction of in-stream and riparian habitat, increases in water temperature, streambed scouring, and downstream siltation of streambed substrate, riparian areas, estuarine habitat, and reef systems." Accessed online November 21, 2005, <http://www.epa.gov/OWOW/NPS/MMGI/Chapter4/ch4-2a.html>.

<sup>8</sup> This estimate is based on claims filed with the State of Oregon. There are almost certainly additional claims that have been filed with the County that have not been filed with the State.

# Case Study 4: A Residential Subdivision in Yamhill County's Vineyards

## Executive Summary

### BASIC FACTS OF THE CLAIM

<b>Claimant:</b>	Merlin and Sandra LaJoie
<b>Date Acquired:</b>	June 3, 1974
<b>Location of property:</b>	20855 NE Williamson Road, just west of Newberg
<b>County:</b>	Yamhill
<b>Acreage of property:</b>	51 Acres
<b>Zoning:</b>	Exclusive Farm Use
<b>Proposes Use:</b>	Divide property into twenty 2.5-acre residential lots
<b>Monetary Claim:</b>	\$3,000,000
<b>Claim filed with:</b>	Yamhill County and the State of Oregon
<b>Date filed:</b>	Yamhill County—May 25, 2005; State of Oregon—May 26, 2005
<b>Claim Status:</b>	Yamhill County – Waiver granted July 20, 2005 State of Oregon – No decision made prior to decision on <i>Macpherson v. Department of Administrative Services</i>

The goal of this claim is to divide a 51-acre parcel and develop twenty 2.5-acre residential lots. The parcel is currently zoned for exclusive farm use and classified as high-value farmland. At the time the LaJoies acquired the property, it was zoned for agriculture but the zoning at that time was much less restrictive than the current EFU zoning. Senate Bill 100, directing the state to establish statewide planning goals, had already been passed at that time. However, Goal 3, protecting agricultural land had not yet been adopted.

The parcel's current zoning requires a 40-acre minimum lot size and an \$80,000 revenue test for farm dwellings. These requirements effectively prevent the LaJoies from pursuing their plans for residential development. A waiver of the minimum lot size and the revenue test are required for this development to move forward.

The county has approved the claim, effectively waiving the 40-acre minimum lot size and the \$80,000 revenue test. The state did not rule before suspending all claim activity in the wake of the decision on *Macpherson v. Department of Administrative Services*.

This parcel is surrounded by agricultural operations. There is a great deal of concern among the neighbors that the development will cause conflict between residential and agricultural uses and affect the investment climate for farm-related operations. While the land will be lost to farming, the density of the proposed subdivision may preclude future urbanization because infill is difficult and provision of urban services will be expensive.

## 1. Introduction

This case study involves a claim by the owners of a 51-acre parcel of land zoned for Exclusive Farm Use (EFU) in Yamhill County.

This case illustrates the potential conflict between residential development and agricultural operations. In this case, the conflict threatens a small vineyard and winery that, after a substantial investment of time and capital, is beginning to turn a profit. The encroachment of suburban-style residential development may threaten the future of this business as new residents are often intolerant of the noise, dust, and other impacts of farming.

This case also illustrates the impact of Measure 37 on the investment climate in rural areas. As Oregon's agricultural economy transforms from commodity products to high value-added products like nursery crops and wine, the investment required increases. The certainty provided by the land-use system encourages that investment; Measure 37 introduces a new source of uncertainty for investors in the agricultural and nursery industries, even as it creates opportunity for investment in residential development.

## 2. Description of the claim

Merlin and Sandra LaJoie claim that land use regulations have decreased the value of their property located in Yamhill County and west of Newberg by \$3,000,000. The LaJoies' 51-acre parcel is currently zoned for EFU and is classified as high-value farmland, with a 40-acre minimum lot size and an \$80,000 revenue test for all farm dwellings.<sup>1</sup>

When the LaJoies acquired the property in 1974, it was zoned for agriculture under the agricultural zoning laws the county passed in 1968. Under this zoning, farm dwellings were an outright permitted use, and single family dwellings not in conjunction with a farm were a conditional use.

The claimants do not provide an explanation for how they calculated the \$3,000,000 estimate of lost value. They specifically requested a waiver of the land use regulations rather than compensation.<sup>2</sup> The county's staff report states that the county assessor has determined the estimate to be reasonable "based on the uses requested by the owner."<sup>3</sup>

## 3. History and Current conditions

The LaJoie claim lies just west of Newberg in Yamhill County, not far from the Newberg urban growth boundary. Agriculture has long been the principal industry in Yamhill County. According to the 2002 Census of Agriculture, Yamhill County has over 2000 farms comprising almost 200,000 acres. Over half of the farms range in size from 10 to 49 acres. The county ranks 4th out of the 36 counties in annual market value of agricultural production, and the value of that production rose by about 25 percent from 1997 to 2002. Yamhill County accounts for about 30 percent of the state's total acreage in grapes and 23 percent of the state's acreage in filberts.<sup>4</sup> According to Yamhill County's website, nineteen wineries, the largest concentration of any Oregon county, lie scattered about the county, which produces the highest number of award-winning wines in the state.<sup>5</sup>

Against this background of the county's agricultural history, development pressure is propelled by the growth of the entire Portland metropolitan region. The county's population grew 36 percent from 1990 to its current number of 89,200. The town of Newberg is the second largest city in the county and has experienced a 52 percent increase in population during this time.<sup>6</sup>

According to the 2000 Census, over 27 percent of Yamhill County residents commute to Washington, Multnomah or Clackamas counties to work.<sup>7</sup>

This development pressure provides the financial incentive to convert farmland to residential uses. Measure 37 offers long-time agricultural landowners the opportunity to realize financial gains by selling their land for residential development. Landowners have filed Measure 37 claims on almost 15,000 Yamhill County acres.

In the midst of these changing economic and demographic circumstances, the City of Newberg is in the process of preparing to expand its Urban Growth Boundary (UGB) within the next two years. The city expects that Newberg will have a population of 38,352 by 2025, and a population of 54,097 by 2040, and must add 606 acres to the urban growth area, including 360 acres of residential land.<sup>8</sup> The expansion recommended to the City Council by the Ad Hoc Committee on Newberg's Future in June of 2005 does not add the LaJoie property or the immediately surrounding properties to the Urban Growth area.<sup>9</sup>

### ***Current Neighborhood Character***

The LaJoie claim is located about two miles west of the City of Newberg's urban growth boundary in Yamhill County. The area just west of Newberg is characterized by vineyards, hazelnut orchards and other agricultural uses and rural residential properties.

The LaJoie and immediately surrounding property is a mixture of EFU 40 acre parcels, EFU 20-acre parcels, agricultural forestry ten-acre parcels, and smaller parcels with rural residences. The LaJoies' property currently contains a mature hazelnut orchard. Just west of the parcel up a steep slope lies a small (20-acre) parcel with 16.5 acres of pinot noir grapes. The vineyard owner produces grapes for sale to other wineries and also produces wines under his own label at the site. Williamson Creek runs through the LaJoie property and into a pond also located on the property.

### ***History, Trends and Conditions Leading to the Claim***

Many of the residents of this neighborhood have owned their land for many years. The government first platted the area in the first decade of the 20<sup>th</sup> century, and several of the current landowners' families purchased land during that era. Thus, a number of landowners in the area could file Measure 37 claims.

Some of these same landowners struggle with conflicting values and needs. On the one hand, they value the land and their role as stewards of both the land and the environment. On the other hand, many aging property owners feel the need to generate income from land that they may not be physically able to farm. These conflicts lead to situations like the LaJoie claim, where neighbors do not want to see residential development occur but also understand the factors persuading the LaJoies to file the claim.

The LaJoies purchased the property on June 3, 1974. At that time, the county's zoning ordinance classified the land as Agricultural. In September 1974, the state acknowledged the county's comprehensive plan. From February 1976 to 1993, the comprehensive plan zoned the property EF-40, with 40-acre minimum lot sizes. Later, the state adopted a new rule requiring high-value farmland to show gross sales of \$80,000 in order to gain approval for a farm dwelling. This rule became effective on March 1, 1994. These rules effectively prohibit the LaJoies from dividing their property and building additional houses.

Yamhill County requires Measure 37 claimants to follow a two-step claim filing process. The claimant must first send a letter to the county's planning department requesting permission for a

land use action. When the planning director responds that this action is not allowed under the current land use laws, the applicant can then file a formal Measure 37 claim. The LaJoies received a letter enforcing the challenged land use regulations on April 29, 2005; they filed the formal claim on May 25, 2005.

## **4. Probability of Development as Planned**

A number of issues must be settled before the LaJoies can develop their property as proposed in their Measure 37 claim. These issues fall into four categories:

- County zoning issues;
- State land use law;
- Issues related to the normal development process;
- The constitutionality of Measure 37.

Although Yamhill County has approved the claim, county zoning issues may interfere with the LaJoies' development plans. At the time the LaJoies purchased the property, the county had already zoned the LaJoie land agricultural. The agricultural zoning allowed farm dwellings as an outright permitted use, but land owners needed to apply for a conditional use permit to build single family dwellings not in conjunction with a farm. Although the farm dwelling zoning does not list a specific minimum lot size, the LaJoies will probably need to apply for conditional use permits on 20 lots in order to develop them as proposed. Alternatively, the LaJoies could argue that the residences on 2.5 acre lots should qualify as farm dwellings.

The claim has also been submitted to the state. Local comprehensive plans must be consistent with Oregon's statewide planning goals and therefore a state waiver is required if those laws were in place before the claimant purchased the property. The state did not issue a decision on the LaJoie claim before the Oregon Circuit Court decision stopped the state from processing claims (see below).

Senate Bill 100 had been signed into law when the claimants purchased the property in June of 1974; however, Goal 3--Preserve and maintain agricultural lands—was not adopted until December 27, 1974 and was not effective until January 15, 1975. It is unclear how the state might rule with respect to this waiver.

To proceed with their development plans, the claimants will need to file a current development application with Yamhill County and comply with all current health and safety regulations. The biggest concern is likely to be the addition of 20 new wells and septic systems on the parcel. However, the standard suburban lot size in Yamhill County is 2 acres, indicating that the county would likely approve 2.5 acre lots for septic.

On October 14, 2005, the Marion County Circuit Court issued an opinion in *Macpherson v. Department of Administrative Services*, Case No. 05C10444, holding that Measure 37 is unconstitutional. Preliminary advice by the Oregon Department of Justice to the DLCD is that waivers issued prior to this opinion may not have any legal effect ([oregon.gov/LCD/measure37.shtml](http://oregon.gov/LCD/measure37.shtml)). The Court has denied any stay pending appeal. Therefore, unless the *Macpherson* decision is overturned, the LaJoies will not be permitted to go forward with developing their properties. Oral arguments before the Supreme Court will be heard early in 2006.

## **5 Potential Impacts of Development**

If the issues cited above are resolved and the LaJoies can move forward with their development plans as proposed, they will remove the mature hazelnut orchard currently on this land and build twenty houses on 2.5 acre lots.

The impacts of this development fall into several categories:

- Density and seclusion
- Traffic and other infrastructure, including water;
- Environmental impacts
- Economic impacts, especially on neighboring agricultural operations
- Planning and provision of urban services

### ***Density and seclusion***

Obviously, the addition of twenty households will have a significant impact on this neighborhood. Neighbors have expressed concern that this level of density is too much, too soon, and that the development would threaten their seclusion.

### ***Traffic and infrastructure***

The development might also overtax the roads and other infrastructure that serve the property. In conjunction with a development application, the LaJoies will likely need to address traffic issues on Williamson Road. In addition, they will need to determine whether to seek additional access points besides Williamson Road and assess the impact of those additional accesses.

Although neighbors have expressed concerns about water supply, the LaJoie property is not located in a groundwater-limited area. Thus, wells should not be an obstacle for development of these properties on two-and-a-half-acre lots.<sup>10</sup>

### ***Environmental impacts***

The proposed development is likely to have two types of environmental impacts. The first concern is the increase in storm water runoff as impervious surfaces are added and the subsequent impact on nearby streams.<sup>11</sup> The second concern is the impact of twenty new septic tanks on water quality. Some neighbors also expressed concerns that new residents with small plots of land will not feel the same commitment to stewardship of the land as the existing landowners who have held and worked the land for a number of years.

### ***Economic impacts***

Yamhill County's staff report indicates that there is "substantial evidence in the record that compensation due the applicant for reduction in the fair market value of the subject property would be approximately \$3,000,000 based upon the uses requested by the owner." If this is true, the LaJoies will benefit if, ultimately, they can develop the residential subdivision on the parcel.

However, it is difficult to determine how likely the \$3,000,000 estimate represents the LaJoies' real loss in value on their property since the claim application does not indicate how the figure is derived. A scan of existing properties in the area of comparable size and services are selling for between \$90,000 and \$130,000 per acre.<sup>12</sup> Thus, the estimate seems reasonable, assuming



current market conditions. Those current conditions include a limited amount of rural residential land available for lots of this size.

The proposed residential development could have a negative economic impact on neighbors who continue to use the land for agriculture. The vineyard and winery property adjacent to the LaJoies' property may be particularly vulnerable. New residents may purchase rural property without realizing how dirty and noisy farming can be. These situations often cause conflict between residential and agricultural development.

The winery owner has invested over \$2 million over the last 15 years in his vineyard and winery. Because of previous experience with agricultural/residential conflict, he invested in his current location only after learning that the land near him was zoned for agricultural use. He felt fairly certain that the land use laws would prevent problems he had experienced in areas without EFU zoning.

The uncertainty caused by the LaJoies' and other Measure 37 claims may negatively impact the agricultural investment climate. Wine grapes and other high value-added agricultural products require significant investment, and that investment will only occur if farmers feel some certainty that residential uses will not interfere with their ability to farm.

### ***Local government planning and services***

The density of the proposed development probably precludes future urbanization. Although land will be lost to farming, the density is sufficient to make infill development very difficult if it is ever incorporated into a future UGB expansion. This level of density also makes urban services costly, limiting the options for mitigating future conflicts between septic systems and wells.

## **6. Summary**

This claim, just west of Newberg in a high-value farming area of Yamhill County, showcases the transition of a traditional agricultural area to residential use without the planning that would provide infrastructure. This classic case of agricultural land conversion is not as large as many of the claims, but it still illustrates the economic pressures that lead landowners to file claims to reap the economic benefits of a growing metropolitan population.

Although the county has approved the claim, the state has not, and a number of legal hurdles may prevent the LaJoies from developing as proposed in the claim.

If the LaJoies' development moves forward, it will likely have a number of impacts on neighbors, many of whom have lived and farmed in the area for many years. Neighbors will experience less seclusion, more traffic, and will compete with the new neighbors for access to water. These problems often occur when development precedes the investments in infrastructure required to accommodate additional households.

The nearby agricultural operations will struggle to limit the conflict between agricultural and residential uses. And the additional uncertainty of this and other Measure 37 claims could deter additional investment in agriculture.

## **7. Sources Consulted and Persons Interviewed**

### **Documents Consulted:**

Yamhill County Department of Planning and Development Measure 37 Application. Claim submitted by Merlin A. and Sandra K. LaJoie on May 5, 2005. Docket M37-80-05.

Yamhill County Planning Staff Report to the Board of County Commissioners, Measure 37  
Claim File Number M37-80-05, September 8, 2005

**Persons Interviewed:**

Cliff Anderson

Kaye and Fred Herring

Merilyn Reeves, President, Friends of Yamhill County

Mike Brandt, Planning Director, Yamhill County

**Case Study Reviewers:**

Mark Fancy, Senior Planner, Mid-Willamette Valley Council of Governments

Steve Olson, Assistant Planner, City of Newberg

## Endnotes

<sup>1</sup> Oregon Administrative Rule (OAR) 660-033-0135(7), which became effective on March 1, 1993, established the \$80,000 income test for approving a farm dwelling on high-value farmland. Specifically, the rule states that for the approval of a dwelling “customarily provided in conjunction with farm use” on high-value farmland, the owner must demonstrate, in part, that the farm operation produced at least \$80,000 in gross annual income from the sale of farm products in either the last two years or in three of the last five years. The income test is lower for areas with lower soil quality; however, this property is classified as high-value farmland and therefore must meet the \$80,000 test.

<sup>2</sup> Yamhill County Department of Planning and Development Measure 37 Application. Claim filed by Merlin A. and Sandra K. LaJoie on May 25, 2005. Docket number M37-80-05.

<sup>3</sup> Yamhill County Planning Staff Report to the Board of County Commissioners, Measure 37 Claim File Number M37-80-05, September 8, 2005.

<sup>4</sup> 2002 Census of Agriculture. Volume 1 Chapter 2: Oregon County Level Data, <http://www.nass.usda.gov/census/census02/volume1/or/index2.htm>, accessed November 18, 2005.

<sup>5</sup> Yamhill county web site, <http://www.co.yamhill.or.us/>, accessed November 18, 2005.

<sup>6</sup> Cai, Qian. 2005. Oregon Population Report. Population Research Center, Portland State University, March. [http://www.pdx.edu/media/p/r/prc\\_2004\\_Population\\_Report.pdf](http://www.pdx.edu/media/p/r/prc_2004_Population_Report.pdf). Accessed November 18, 2005.

<sup>7</sup> U.S. Census Bureau, Residence County to Workplace County Flows for Oregon. <http://www.census.gov/population/www/cen2000/commuting.html#OR>. Internet Release date: March 6, 2003. Accessed November 18, 2005.

<sup>8</sup> City of Newberg, Ordinance No. 2005-2626.

<sup>9</sup> City of Newberg, ad Hoc Committee on Newberg’s Future, Report to City Council, June 29, 2005. <http://ci.newberg.or.us/>, accessed November 21, 2005.

<sup>10</sup> Oregon Water Resources Department Water Right Mapping System at [http://map.wrd.state.or.us/apps/wr/wr\\_mapping/](http://map.wrd.state.or.us/apps/wr/wr_mapping/).

<sup>11</sup> The U.S. Environmental Protection Agency’s New Development Management Measure for Urban Runoff states, “During the development process, both the existing landscape and hydrology can be significantly altered. As development occurs, soil porosity decreases; impermeable surfaces increase, channels and conveyances are constructed, slopes increase, vegetative cover decreases, and surface roughness decreases. These changes result in increased runoff volume and velocities, which may lead to increased erosion of stream banks, steep slopes, and unvegetated areas. In addition, destruction of in-stream and riparian habitat, increases in water temperature, streambed scouring, and downstream siltation of streambed substrate, riparian areas, estuarine habitat, and reef systems.” Accessed online November 21, 2005, <http://www.epa.gov/OWOW/NPS/MMGI/Chapter4/ch4-2a.html>.

<sup>12</sup> For examples of comparable properties, see MLS 5085959, 5084473 and 5075078.



# Case Study 5: Using Measure 37 to Attain Home Sites for Family Members

## Executive Summary

### BASIC FACTS OF THE CLAIM

<b>Claimant:</b>	Robert and Dorothy Scott
<b>Date Acquired:</b>	October 28, 1966
<b>Location of property:</b>	38348 Highway 30, Astoria, OR
<b>County:</b>	Clatsop
<b>Acreage of property:</b>	9.9 acres
<b>Zoning:</b>	Residential Agriculture (RA-1) on 9.6 acres; Agriculture/Forestry (AF) on .3 acres
<b>Proposes Use:</b>	Subdivide into one-acre residential lots
<b>Monetary Claim:</b>	Claimants did not submit a monetary claim or amount of loss
<b>Claim filed with:</b>	Clatsop County
<b>Date filed:</b>	January 4, 2005
<b>Claim Status:</b>	Clatsop County – Waiver granted May 11, 2005 State of Oregon – Claimant has not yet filed

Robert and Dorothy Scott's Measure 37 claim requests permission to subdivide their 9.9 acre parcel into one-acre lots. The claimants' goal is to partition the property into four parcels, one for their existing home and three for additional home sites. The Scotts want to give the additional home sites to their three sons. This parcel is about five miles from the city of Astoria and on Highway 30 leading into town.

When the Scotts acquired the property in October 1966, the county had not zoned the parcel. Then, on November 23, 1966, the county established zoning regulations and classified the land as RA-1 with minimum lots of 1 acre. In October 2000, the county changed the minimum lot size of RA-1 land from one to two acres, as mandated by the state.<sup>1</sup>

At first glance, it appears that current law allows the Scotts to meet their objectives without filing a Measure 37 claim. However, they have faced several complications with a one-third acre piece of their property that is currently zoned Agriculture/Forestry (AF). The minimum lot size in AF zones is 80 acres, limiting the claimants' flexibility in dividing the land. Moreover, the land's topography, which includes a river and streams, limits where the claimants can locate the new homesites. Thus, to obtain additional flexibility the Scotts sought a Measure 37 waiver of the two-acre minimum lot size, which would allow for one-acre lots.

Clatsop County approved the Scotts' claim, waiving the two-acre minimum lot size, but the Scotts have not filed with the state. Since the county implemented the two acre minimum lot size as a result of a state requirement, the Scotts must obtain a state waiver to proceed with a land use application and the development.

# **1. Introduction**

This case study examines a Measure 37 claim that will create few adverse impacts on the neighborhood's quality of life or on the county's ability to plan. The case demonstrates that some claimants use Measure 37 to achieve greater flexibility than current zoning allows.

The Scotts own 9.9 acres of land about five miles west of Astoria along Highway 30. They have been trying for a number of years to partition their land to enable their sons to build homes on the site. They want to maintain their current residence on several acres.

The Scotts encountered several problems while they worked to secure the partition, and Measure 37 seemed to them an opportunity to bypass the current zoning in a way that would allow them to develop their land how they wish.

## **2. Description of the Claim**

Robert and Dorothy Scott did not submit a monetary Measure 37 claim. Instead of seeking compensation, the Scotts asked the county to waive the land use regulations enacted since they purchased their property.

When the Scotts acquired their property in October 1966, the county and state had not zoned it. In November 1966, the county established zoning regulations and zoning maps, which designated the Scott's property as RA (Residential agriculture). In 2000, the county changed the minimum lot size on the Scott's property from one to two acres to comply with the state's Goal 14 guidelines.<sup>2</sup>

Moreover, in 1997, the county established an 80-acre minimum lot size in AF zones. Only one-third of an acre of the Scott's property is zoned AF, although the designation limits how the Scotts divide the property.

The Scotts' Measure 37 claim asks the county to restore the one-acre minimum lot size, which will enable them to partition the land in the configuration they prefer.

## **3. History and Current conditions**

The Scotts' property is five miles east of Astoria. The area has long been a rural residential community, comprised of people looking for rural or small-town lifestyles, small commercial farmers, and hobby farmers. The parcel sizes surrounding the Scott's property range from .44 acres to 20 acres. Small commercial farms occupy the land on some of these parcels, but the farmers share the neighborhood with many smaller residential lots, mobile home parks, service uses, and forested land. One landowner platted a residential development on the 40-acre parcel immediately west of the Scott property, but the owner has not proceeded with the development.

When the Scotts moved to this neighborhood in 1966, they sought a place to raise their children in a rural setting with farm animals, a lifestyle that matched the activities of other residents in the neighborhood. Except for occasionally mowing the hay field, the Scotts have not used the land for hobby farming since they sold their animals in 1982.

Development pressures, particularly in the western parts of the county, have recently increased the value of land. Much of the county's new development is for second or vacation homes.

## **4. Probability of Development as Planned**

Clatsop County approved the Scotts' request to waive the two-acre minimum lot size. However, the county will require a state waiver before approving a land use application for a partition or

subdivision since the county changed the minimum lot size based on a state requirement. The Scotts have not yet filed a state claim.

It is unlikely that the Scotts would face problems obtaining septic and well approval for two-acre lots in this part of the county. It might be more difficult – and depend on the specific configuration of the lots - for them to win approval to build on one-acre lots.

The Scotts may not be able to acquire a state waiver. On October 14, 2005, the Marion County Circuit Court issued an opinion in *MacPherson v. Department of Administrative Services*, Case No. 05C10444, holding that Measure 37 is unconstitutional. On October 24, 2005, the court entered a judgment and an order in the MacPherson case directing all defendants, including the Department of Administrative Services and the Department of Land Conservation and Development, not to accept, grant, deny or otherwise rule on any claims under Measure 37. The order also determined that all timelines under Measure 37 are suspended indefinitely.

Therefore, unless the *MacPherson* decision is overturned, the Scotts will not be able to obtain a state waiver, and the county's hands may be tied with respect to approving an application for a partition. The Supreme Court will hear oral arguments on January 10, 2006.

## **5. Potential Impacts of Development**

The most likely scenario for this property is that the Scotts will continue to live on the property for the near future while their sons develop three separate home sites for their own use. This was the original intent of the claim.

The division of the Scotts' property into 4 parcels and the development of three new houses would have very little impact on the area. Three additional homes would not affect traffic, tax the existing infrastructure, or cause significant increases in density that neighbors would notice, particularly given the existing pattern of development in the surrounding area.

Two creeks cross the property. These creeks will limit the Scott's flexibility with respect to where the home sites can be placed. The creeks flow into the John Day River nearby and do not support salmon due to existing blockages in that system.

The Scotts want to establish only 3 new home sites on the property, but if they obtain a Measure 37 waiver, they could pursue one-acre home sites. One acre sites would probably require additional steps to address water, sewer, and road access. Nevertheless, given the current character of the neighborhood, residential development on one-acre lots probably would have little effect on the area's character or on the quality of life of other residents.

Because this is in a rural residential, rather than an agricultural, zone, there would be few or no impacts on the state's agricultural economy. Clatsop County is not an important agricultural county, producing less than one percent of the total value of farm products in Oregon.<sup>3</sup>

## **6. Summary**

Robert and Dorothy Scott's Measure 37 claim seeks to remove the two-acre minimum lot size zone from their property. At the time they acquired the property, there were no land use laws in place. Now they wish to divide their property to create additional home sites for their sons. They tried to partition for this purpose in the past, but complications related to a one-third of an acre slice of their property made it difficult to do so under the two-acre minimum zoning.

The Scotts' claim has been approved the Clatsop County, but has not been submitted to the state. Since they do need permission from the state, they are unlikely to receive that waiver

unless and until the Supreme Court reverses the Marion County Court's decision in *MacPherson v. Department of Administrative Services*.

If the Scotts apply for a partition or subdivision with one-to-two acre lots and the county approves their application, it is unlikely that the surrounding neighborhood or the county will suffer any ill effects in terms of quality of life or economic effects.

## 7. Sources Consulted and Persons Interviewed

### **Documents Consulted:**

Clatsop County Measure 37 Staff Report, May 3, 2005.

Clatsop County Board of County Commissioners, Resolution and Order No. 2005 05 0008, May 12, 2005

Measure 37 claim form of Robert and Dorothy Scott, filed January 4, 2005

### **Persons Interviewed:**

Kathleen Sellman, Community Development Director, Clatsop County

Todd Cullison, Watershed Council

Dorothy Scott

### **Case Study Reviewer:**

Thane Tienson

## Endnotes

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<sup>1</sup> This action was mandated to implement Goal 14. See Section 2 for details.

<sup>2</sup> OAR 660-004-0040(7), adopted in 2000, provided "For rural residential areas designated after the effective date of this rule, the affected county shall either:

"(A) Require that any new lot or parcel have an area of at least ten acres, or

"(B) Establish a minimum size of at least two acres for new lots or parcels in accordance with the requirements for an exception to Goal 14 in OAR 660, Division 014. The minimum lot size adopted by the county shall be consistent with OAR 660-004-0018, 'Planning and Zoning for Exception Areas.'"

<sup>3</sup> 2002 Census of Agriculture. Volume 1 Chapter 2: Oregon County Level Data, <http://www.nass.usda.gov/census/census02/volume1/or/index2.htm>, accessed November 18, 2005.

# Case Study 6: One Farm Dwelling in Jefferson County

## Executive Summary

### BASIC FACTS OF THE CLAIM

<b>Claimant:</b>	John H. Poppe, Sr. Trust
<b>Date Acquired:</b>	Acquired by John H. Poppe Sr. on November 30, 1966; Transferred to Trust on Oct. 23, 1992
<b>Location of property:</b>	Northwest corner of the intersection of Franklin Lane and Feather Drive
<b>County:</b>	Jefferson
<b>Acreage of property:</b>	40 acres
<b>Zoning:</b>	Exclusive Farm Use A-1
<b>Proposes Use:</b>	Build a single dwelling
<b>Monetary Claim:</b>	\$100,000
<b>Claim filed with:</b>	Jefferson County and the State of Oregon
<b>Date filed:</b>	Jefferson County—Jan. 4, 2005; State of Oregon—Jan 4, 2005
<b>Claim Status:</b>	Jefferson County – Waiver granted July 20, 2005 State of Oregon – Waiver granted July 1, 2005, but deemed invalid by <i>Macpherson v. Department of Administrative Services</i>

The goal of this claim is to eliminate restrictions on building a dwelling on the John H. Poppe Sr. Trust property to facilitate the sale of the property. At the time Mr. Poppe acquired the property, it was zoned A-1 Agricultural, which permitted one-acre lots with single-family dwellings as an outright use. This zoning was in place until 1973. A dwelling was on the property at the time. The structure burned down in 1970 and has not been replaced.

Under existing law, the structure cannot be replaced unless the farm income test of \$40,000 is met. State income standards for the approval of farm and non-farm dwellings on agricultural land became effective on March 1, 1994. In that same year, the county enacted these regulations specifying the requirements for dwellings in conjunction with farm use.

As a result of the claim, the County has granted a narrow waiver allowing construction a single-family dwelling on the property. The state also granted a waiver in July 2005 to the John H. Poppe Sr. Trust to allow the trust to reconstruct or establish a dwelling on the property. The state's position is that since the Trust currently owns the property and is the applicant, the waiver only applies to regulations established after October 23, 1992.

Mr. Poppe has filed a development application. However, their state waiver has been suspended pending the outcome of *Macpherson v. Department of Administrative Services*.<sup>1</sup>



## **1. Introduction**

This case study involves a 40 acre parcel of agricultural land in Jefferson County. Mr. John Poppe purchased the property with a dwelling in 1966. In 1970, the house burned down and was not rebuilt. In 1992, the land was transferred to a revocable Living Trust (the Trust).

Today, the land is zoned for Exclusive Farm Use (EFU). In 1994, the state adopted, and the county enacted, regulations specifying farm income requirements for the construction of a dwelling on EFU property. These laws effectively restrict the Trust from building a dwelling because the property is not producing the required income.

Mr. Poppe currently leases the land. He would like to sell the land, and has identified an interested buyer. The buyer would like to live on the property; thus, building a dwelling will facilitate the sale of the property to an owner with the intention to farm the land. If the house is built and the land sold, the new owners can live in the house but, under current interpretations of Measure 37 and the conditions of the County and State waivers, the new owners will not inherit the waiver. Thus, the new house will be a nonconforming use if the farm income test is not met.

The potential impact of this claim hinges on the extent to which the new owner is committed to continuing to farm the land.

## **2. Description of the claim**

The John H. Poppe Trust has filed a Measure 37 claim with both Jefferson County and the State of Oregon. The claim contends that land use regulations preventing him from building a dwelling on his property reducing the value of his property by \$100,000.

Mr. Poppe has owned the property since at least 1966, when it was in the A-1 Agricultural District. The A-1 Agricultural District, which was in place from 1964 until 1973, permitted one acre lots with single family dwellings as an outright use. There was a dwelling on the property at the time, but it burned down in 1970 and was not replaced.

The Agricultural District Zoning was replaced in 1973 by the EFU A-1 designation. Regulations enacted by the state in 1993 and enforced by Jefferson County in 1994 prohibit non-farm dwellings on EFU land unless the owner can demonstrate that the operation produced \$40,000 gross farm annual income from the sale of farm products in either the last two years or in three of the last five years.

## **3. History and Current Conditions**

This property is about ten miles southwest of Madras and just east of the Cove Palisades State Park in central Jefferson County. This part of the county is primarily agricultural but is facing increasing residential development pressures. The county's population has grown by over forty-eight percent from 1990 to 2004—with fifty seven percent growth within the City of Madras<sup>2</sup>. Much of this development pressure is spilling over from the phenomenal growth in other parts of Central Oregon. As crowding in Bend and Redmond force land prices up, people have become interested in more affordable properties in Jefferson County. Land values in Jefferson County are rising, and many new residential developments have been proposed.

The property in question is being leased and is being farmed, although not at sufficient intensity to meet the \$40,000 income limit. The surrounding properties are also in farm use; parcel sizes vary. Adjoining parcels are 80 acres, 438 acres, and 59 acres.

## 4. Probability of Development

The state's Department of Land Conservation and Development (DLCD) concludes in its final staff report about the claim issued June 29, 2005, that it is "more likely than not" that the fair market value of the Poppe's property has been reduced. The state's final order states that the claim is valid and that instead of paying compensation the state will not apply the regulations that allow Poppe to reconstruct or establish a dwelling on the property. The Jefferson County Commissioners approved a similar order on July 20, 2005.

On October 14, 2005, the Marion County Circuit Court issued an opinion in *MacPherson v. Department of Administrative Services*, Case No. 05C10444, holding that Measure 37 is unconstitutional. Preliminary advice by the Oregon Department of Justice to the DLCD is that waivers issued prior to this opinion may not have any legal effect<sup>3</sup> Mr. Poppe has filed a development application to build his house, but County may not be at liberty to grant it. Although the County was not a party to the *MacPherson* suit, a ruling by the Oregon Supreme Court upholding the decision would invalidate any county action based on a Measure 37 claim. On the other hand, if the Supreme Court overturns the Marion County Circuit Court opinion, the Poppes will likely be able to develop their property as proposed in their claim.

Even in the absence of a valid Measure 37 claim, this property could include a farm dwelling in the near future. If the potential buyers are willing to purchase the property, farm it intensively, and meet the \$40,000 income test, they could have an approved dwelling within two years.

## 5. Potential Impact of Development

A potential buyer for the land in question would like a house on the property so that he is able to live on the land and use it to grow hay. If the claim moves forward as proposed, the land will be transferred from an owner who is leasing the land for farming to an owner who will farm the land directly and live on the land. While an additional residence will be added to the county, there will be little if any impact on the agricultural economy. It is possible that the new owner may be able to raise the productivity of the land by farming it more intensively.

The Jefferson County staff report verifies this scenario. "Potential public benefits of continuing to apply EFU regulations are the retention of farm land and open space. The property is irrigated and slightly more than half is classified as prime soil meeting the definition of high value farmland. If the only proposed use is to place one dwelling on the property, the potential impact will be minimal because the property likely will continue to be farmed."

On the other hand, if the buyer chooses not to farm the property, the waiver of the income test for this property could remove it from commercial farming, moving it instead into the realm of "hobby farming." Given the development pressure facing this part of the state, it is not inconceivable that a buyer could be interested in simply purchasing the house with no intention of continuing the farm the land.

## 6. Summary

This case study seems simple on its face. A house was on the property when the claimant purchased the land. The house burned down but was not replaced, and the claimant leased the land for farming. But the claimant is now interested in selling the land, and the interested buyer wishes to live on the land and farm it for hay. If this is indeed the situation that plays out, the claim may result in higher productivity for this agricultural land.

However, the waivers granted by Jefferson County and State of Oregon ensure that the claimant will *no longer be required* to farm the land in order to have a dwelling on this land. An alternative to the scenario described above is that the claimant decides to build and live in the house but no longer farm the land at all.

## 7. Sources Consulted and Persons Interviewed

### Documents Consulted:

Oregon Department of Land Conservation and Development, Final Staff Report and Recommendation, Ballot Measure 37 Claim M119150, June 29, 2005.

Oregon Department of Land Conservation and Development, Final Order, Ballot Measure 37 Claim M119150, July 2005

Jefferson County Measure 37 Claim Report, Claim Number 05-M37-03.

Jefferson County Board of Commissioners, Waiver of Land Use Regulations, Waiver #2005-004, Claim #05-M37-03, July 20, 2005.

### Persons Interviewed:

Chris Gannon, Planning Director, Jefferson County.

### Case Study Reviewer:

Becky Steckler, EcoNorthwest

## Endnotes

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<sup>1</sup> Due to the decision in the Macpherson case, the State of Oregon believes that decisions by the state to not apply (to waive) state laws have no legal affect, at least pending the outcome of the Macpherson appeal. As a result, the state also believes that local governments are not authorized to approve uses of property that require state waivers.

<sup>2</sup> Cai, Qian. *2004 Oregon Population Report*. Population Research Center, Portland State University, March 2005. Accessed at [http://www.pdx.edu/media/p/r/prc\\_2004\\_Population\\_Report.pdf](http://www.pdx.edu/media/p/r/prc_2004_Population_Report.pdf) on November 14, 2005

<sup>3</sup> [www.oregon.gov/LCD/measure37.shtml](http://www.oregon.gov/LCD/measure37.shtml), viewed November 14, 2005

# Case Study 7: Residential Subdivision on Productive Farmland in Washington County

## Executive Summary

### BASIC FACTS OF THE CLAIM

<b>Claimants</b>	C. Hoyt and Phyllis Jarrell
<b>Date Acquired:</b>	Jan 31, 1967; Sept 15, 1967
<b>Location of property:</b>	49490 NW Clapshaw Hill Rd; 19490 NW Clapshaw Hill Rd Near Forest Grove
<b>County:</b>	Washington
<b>Acreage of property:</b>	72.74
<b>Current Zoning:</b>	Exclusive Farm Use
<b>Proposed Use:</b>	Divide Property into 73 lots and build 72 additional dwellings; construct a community water system
<b>Monetary Claim:</b>	\$4,585,000
<b>Claim filed with:</b>	Washington County State of Oregon
<b>Date filed:</b>	Washington County, May 11, 2005; State of Oregon, August 29, 2005
<b>Claim Status:</b>	County, not decided State, not decided

The goal of this claim is to subdivide 73 acres of Exclusive Farm Use (EFU) land for a residential subdivision with a community water system. This property is a working farm in the heart of an historic farming community on some of the most productive farmland in Oregon. Because the land is located an easy commute from the employment center of Hillsboro, Beaverton, and even downtown Portland, this section of the county is experiencing significant development pressures. Washington County has received over 400 Measure 37 claims comprising over 14,400 acres.

The Jarrells acquired their land in 1967, before the land was subject to any zoning. Thus, an approved Measure 37 claim would open the door to any type of development that meets health and safety requirements. Based on the acquisition date and apparently continuous ownership, the county and state would likely approve the Jarrells' proposal for one acre lots in combination with the proposed community water system.

The location of the proposed development poses obvious challenges for neighboring farmers. Many have personal experience with the conflicts between agriculture and residential development, and fear that the new residents and their complaints will cause problems that will cost farmers time and money and reduce the value of their land for farming. They question the fairness of exempting the claimants from EFU zoning that will limit their own ability to sell as profitability falls. Many long-time residents also fear the loss of a unique community that they view as an historic resource.

## 1. Introduction

This case study involves a claim on 73 acres of prime farmland in Washington County, several miles northwest of Forest Grove's urban growth boundary. Washington County has received more than 400 Measure 37 claims.<sup>1</sup>

This case demonstrates the potential for development following from Measure 37 claims to create conflict between agricultural and residential uses—conflicts that Oregon's statewide land use system was designed to prevent. This case also highlights the situation of farmers who purchased their property after EFU zoning was enacted. These farmers are excluded from taking the same action taken by the Measure 37 claimants—that of selling their land for development.

## 2. Description of the Claim

The Jarrells' Measure 37 claim proposes dividing their 73 acre property into 73 lots and building 72 additional dwellings, one on each lot. They also propose the development of a community water system. The Jarrells have filed their claim with both Washington County and the State of Oregon.

The property is currently zoned exclusive farm use (EFU). The Jarrells acquired the property in 1967, when the property was unzoned. Since the property was unzoned, there was no minimum lot size and the county allowed a single-family dwelling on each lot.

The Jarrells contend that the land use laws applied to their property since 1967 have resulted in an economic loss of \$4,585,000. The regulations that restrict the use of the property include the county's EFU dwelling and land division standards, which were enacted in the late 1970s and early 1980s. The current minimum lot size in the EFU district is 80 acres for farm parcels and 20 acres for nonfarm parcels eligible for a non-farm dwelling. Therefore, the property cannot be further divided under the existing designation.

## 3. History and Current Conditions

This section of Washington County is known as the Hillside community. It is an historic farming community that has a long tradition and is still a productive part of the Washington County agricultural economy.

According to the 2002 Census of Agriculture, Washington County has 1900 farms and 131 thousand acres of farmland. The value of agricultural products of the county was \$231 million in 2002, making it the 4<sup>th</sup> most productive agricultural county in Oregon. The county's average value of agricultural land and buildings per acre is the second highest in the state, at \$7,294 per acre—only Multnomah County has a higher average value per acre.<sup>2</sup> The primary agricultural products in this area include nursery stock, filberts, wine grapes, dairy, grass and clover seed, berries, tree fruit, and cover crops.

The investment climate for agriculture in this section of Washington County continues to be strong. One local nurseryman noted that he bought farmland in the immediate vicinity for \$4000 per acre in 1992, but by 2004 he purchased similar property for \$12,000 per acre. Even with the price increases, farmers compete to acquire land through personal networks and relationships, and acreage often sells before the owner officially lists it for sale.

Unlike other communities experiencing development pressures, this community remains firmly agricultural. The parcels surrounding the Jarrells' property are designated EFU. Several parcels to the west, on more sloped land, are zoned AF-20 with smaller minimum lot sizes, but are still farmed. Based on the letters received by Washington County's planning department, existing farmers intend to continue farming and want the government to protect the EFU land for that purpose. The Jarrell's property also borders the town center, including the historic church and schoolhouse.

### ***Circumstances Leading to the Claim***

This part of Washington County would be attractive to potential residents of the proposed development. The valley is stunningly beautiful, with a view of both the coast range and Mount Hood. The employment centers of Hillsboro, Beaverton, and downtown Portland are accessible, and the Portland airport is only a 45 minute drive. Given the restrictions on residential development on other parcels in this area, one-acre rural residential lots are very rarely available.

The parcel in question is currently planted with hazelnuts. The Jarrells put the land on the market prior to the passage of Measure 37 but did not find a buyer, suggesting that they had overpriced the land for the agricultural market. Other factors could include the holding cost, or the cost of converting the hazelnut orchard to another use.

## **4. Probability of Development**

Neither the county nor the state approved the Jarrells' claim prior to the Marion County court decision in *MacPherson, et al vs. Department of Administrative Services*. The state and county have stopped issuing decisions on claims, but the facts of the Jarrell claim suggest that both the county and state would have found it valid and waived the land use regulations that prevent the owners from dividing the land. The county investigated an issue with a suspected break in the chain of ownership but found that the supposed interruption would not invalidate the claim.

Had they received a waiver from the county and state, the Jarrells would still have to meet a number of requirements before the proposal could move forward. They would have to file a subdivision application with the county and file for a water right for the proposed community water system. The state does not list this neighborhood as a groundwater limited area, so the water right would probably not be difficult to obtain.

Septic approval may pose the most difficulty. The absolute minimum size for a lot with a septic system is 20,000 square feet, but that is often not sufficient to meet septic system health and safety requirements. A commonly-used rule of thumb is that a two-acre lot is sufficient. The provision of a community water system may provide additional flexibility because of the reduced probability of contaminating nearby wells. Nevertheless, the developer would need to provide setbacks for the well and septic systems. This would affect how small the lots can be, and, therefore, the number of residences the county could approve for the site.

Finally, the developer would need to address a number of traffic issues, including the location of access points. Once again, this would not prevent the subdivision but would add to the cost. The County planning department noted that although they have received a number of letters voicing concern about traffic volume, the site would likely not require system improvements because the roads in that area are underutilized.

The future of all Measure 37 claims hinges on the outcome of a case currently before the Oregon Supreme Court. On October 14, 2005, the Marion County Circuit Court issued an opinion in *MacPherson v. Department of Administrative Services*, Case No. 05C10444, holding that Measure 37 is unconstitutional. Preliminary advice by the Oregon Department of Justice to the DLCDC is that waivers issued prior to this opinion may not have any legal effect ([oregon.gov/LCD/measure37.shtml](http://oregon.gov/LCD/measure37.shtml)). County Counsel for Clackamas County has determined that claims approved prior to the *MacPherson* decision are now null and void. The Court has denied any stay pending appeal. Therefore, unless the *MacPherson* decision is overturned, the Jarrells will not be permitted to go forward with developing their property. Oral arguments before the Supreme Court will be heard in January 2006.

If the Oregon Supreme Court does overturn the decision, the Jarrells' plans will probably move forward. Given the market for these relatively rare rural residential lots, they would probably meet the other requirements and proceed as planned.

## **5. Potential Impacts of Development**

It is not difficult to imagine how a 73-home subdivision would change this historic community of productive farms. Extensive research has documented the impact of residential development on agriculture. Letters sent to the county by neighbors of the Jarrells express concerns about each of these impacts.

### ***General appearance and character of the neighborhood***

A relatively dense subdivision in the middle of farmland will change the look and feel of the area. The Jarrells' property is located in a stunningly beautiful part of Washington County. The housing development will break up the open space and, according to some neighbors, spoil the beauty and solitude of the area. One resident called it "suburbanization" of the rural area.

This farm is adjacent to a number of community landmarks, including a church, a cemetery, and a historic school. The neighbors feel that putting a large residential subdivision in the middle of this farming community will ruin the character of the neighborhood.

### ***Residential/Agricultural conflict***

Clearly, the primary negative impact of this potential development is the potential conflict between residential and agricultural uses of the land. A number of farmers in the area have expressed this concern, and these concerns are warranted, given empirical evidence of these conflicts in other areas.<sup>3, 4, 5, 6, 7</sup>

Daniels and Bowers clearly document these impacts as a cycle leading to farmland conversion.<sup>8</sup> The cycle includes the following:

**Increasing nuisance complaints.** One of the Jarrells' neighbors has personal experience with the difficulty of continuing to farm in the face of increasing nuisance complaints from nearby residents. People who purchase residential property in rural areas are often unaware of the character of nearby farming operations and may complain about noise, smells, spraying, and agricultural machinery on roads. The 1993 Oregon legislature passed a Right to Farm Act limiting the rights of individuals, local governments, and special districts to bring court actions or administratively declare certain farm and forest practices to be nuisances or trespass.<sup>9, 10</sup> Every state in the

country has passed a right to farm law, but evidence indicates that they do little to protect farmland over the long term because right to these nuisance complaints require the farmers' time and attention, distract them from their farming operations, and generally increase tension in neighborhoods.<sup>11, 12</sup> For example, one of the Jarrells' neighbors had to move his operations due to these problems, which simply made it very difficult for him to continue to farm.

**Fewer farm suppliers and processors.** As agricultural land is replaced by residential development, the farmland becomes a patchwork that is difficult for farm suppliers to serve. These services become more expensive and more difficult to obtain for the farmers that continue to farm the area. These services include on-site services such as liming, as well as agricultural equipment and supply dealers.

**Reverse nuisance.** Residents may view farms, particularly fallow fields, as a community resource they can use as a park. Farmers may be forced to erect fences that keep people and their dogs out of their farm fields. The traffic created by residential development may also make it more difficult to move agricultural equipment.

### ***Environment/Natural Resource***

Residential development among this farmland also may have negative effects on environmental quality and the natural resources of the area.

**Loss of Farmland.** The state has documented that the soils on the Jarrells' land are some of the highest quality in Oregon. Residential development will take these soils out of production and effectively eliminate any farming in the future. Once land is made available for development, land prices become too high to achieve a sufficient return from farming, and once divided, it is difficult to aggregate land to obtain sufficiently large parcels for farming. The soil might also become contaminated, and clearing land for farming after structures have been built can prove difficult. Given the productivity of this land for farms, some argue that it is unwise to sacrifice this land for the purpose of residential development that can be accommodated elsewhere. Rather than being determined by careful analysis and planning, the decision to develop this property under Measure 37 is based on when the owners acquired the property.

**Water and air.** Although the state does not currently list the area as a groundwater limited area, residents expressed concerns that the residential development and community water systems will tax the water supply. They note that already there are times when the water is not sufficient. They fear that the development will force existing residents to dig deeper wells. They also fear the impact of 72 new septic tanks on their water quality, as well as the runoff caused by the new impervious surfaces on the development.

### ***Economic Activity/Impact***

For the Jarrells, the passage of Measure 37 means that they can sell their land at the much higher prices commanded by residential development in an area where land use laws limit the supply of residential lots. Their previous attempts to sell their land with EFU restrictions have been unsuccessful at the price they were asking. With the restriction removed from their land, but not from the surrounding land, their property will command a premium.

However, the established agricultural community stands to lose great deal. The problems of residential/agricultural conflict may limit the profitability of nearby farming



operations as the farmer must spend his time and attention addressing these complaints, sometimes within the legal system.

As residential development encroaches on agricultural land, the price of that land often increases, making it more difficult for farmers to expand their operations.<sup>13</sup> Whether this would occur in this area of Washington County depends in part on the existence of other Measure 37 claims. If the supply of farmland is further restricted by residential development, these farmers may find it difficult to achieve the scale required to maximize the productivity of their farms.

As agriculture becomes less profitable, the value of land *for farming* may fall and the existing farmers might consider moving their operations. Those without Measure 37 claims will still be subject to the land use laws that prohibit residential development. Unlike the claimants, these farmers will not have the option of subdividing and selling as the value of their land for farming falls.

### **Costs to Local Government**

Washington County expects that as the road become busier, the county will incur increased costs for road maintenance.

The county has already incurred considerable costs for processing Measure 37 claims. They estimate that processing the claims has cost an average of \$1800 each. The county does not charge an application fee, nor does it ask the claimants to pay the processing costs. Instead, they impose a surcharge on any development application resulting from a Measure 37 claim approval.

A number of neighbors also noted the potential impact on local schools of 72 new residences in the area.

## **6. Summary**

If the Oregon Supreme Court overturns the lower court ruling and upholds Measure 37, this development will probably proceed as planned. Although the Jarrells will be able to reap the financial rewards of selling residential lots in a market where supply is constrained by land use laws, the remaining farmers will face declining profitability as conflict between residents and farms steals their time and attention. Yet those farmers who purchased their property after the enactment of land use protections will not have a valid Measure 37 claim and, therefore, will not have the option to sell their own land for residential development.

At the same time, this residential development will change the character of this historic community and remove valuable farmland from production. The new residents will compete with existing residents for water; existing residents also worry about the additional septic systems and their impact on water quality.

## **7. Sources Consulted and Persons Interviewed**

### **Documents Consulted:**

Abdalla, C.W., and Timothy W. Kelsey. 1996. Breaking the impasse: Helping communities cope with change at the rural-urban interface. *Journal of Soil and Water Conservation*, 51, 462-466.

Berry, David. 1978. Effects of urbanization on agricultural activities. *Growth and Change*, 9(3), 2-8.

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Kelsey, Timothy W., and Loretta Singletary. 1996. When composting meets suburbia. *BioCycle*, 37, 66-67.

Kelsey, Timothy W. 1998. Interdependence, rules, and rural development. *Growth and Change*, 29, 281-294.

Nelson, Arthur C. 1992. Preserving prime farmland in the face of urbanization: Lessons from Oregon. *Journal of the American Planning Association*, 58, 22-30.

Washington County, Measure 37 recommendation and Staff Report, Claim No. 37CL0181 and 182.

### **Persons Interviewed**

Keith Fishback, Vice President, Washington County Farm Bureau

Raymond Taennler

Jim Tice, Washington County Planning Department

Mark Brown, Washington County Planning Department

Alvin and Theresa Meury

Art Meury

### **Case Study Reviewer:**

Lydia Neill, Principal Regional Planner, Metro

## **Endnotes**

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<sup>1</sup> The County stopped accepting Measure 37 claims November 4<sup>th</sup> due to the Marion County court decision in *MacPherson, et al vs. Department of Administrative Services*.

<sup>2</sup> United States Department of Agriculture, Agricultural Statistics Service. 2002 *Census of Agriculture-County Data*. Accessed at <http://www.nass.usda.gov/index.asp>.

<sup>3</sup> Berry, David. 1978. Effects of urbanization on agricultural activities. *Growth and Change*, 9(3), 2-8.

<sup>4</sup> Daniels, Tom, and Deborah Bowers. 1997. *Holding Our Ground: Protecting America's Farms and Farmland*. Washington, D.C.: Island Press.

<sup>5</sup> Kelsey, Timothy W., and Loretta Singletary. 1996. When composting meets suburbia. *BioCycle*, 37, 66-67.

<sup>6</sup> Abdalla, C.W., and Timothy W. Kelsey. 1996. Breaking the impasse: Helping communities cope with change at the rural-urban interface. *Journal of Soil and Water Conservation*, 51, 462-466.

<sup>7</sup> Kelsey, Timothy W. 1998. Interdependence, rules, and rural development. *Growth and Change*, 29, 281-294.

<sup>8</sup> Daniels, Tom, and Deborah Bowers. 1997. *Holding Our Ground: Protecting America's Farms and Farmland*. Washington, D.C.: Island Press. Page 6.

<sup>9</sup> ORS 30.930

<sup>10</sup> Oregon Department of Agriculture website. Retrieved December 19, 2005, from [http://www.oregon.gov/ODA/pub\\_fh\\_misc.shtml#Right\\_to\\_farm](http://www.oregon.gov/ODA/pub_fh_misc.shtml#Right_to_farm).

<sup>11</sup> Nelson, Arthur C. 1992. Preserving prime farmland in the face of urbanization: Lessons from Oregon. *Journal of the American Planning Association*, 58, 22-30.

<sup>12</sup> Daniels, Tom, and Deborah Bowers. 1997. *Holding Our Ground: Protecting America's Farms and Farmland*. Washington, D.C.: Island Press.

<sup>13</sup> *Ibid.*



## Case Study 8: Partition of Commercial Woodland in Coos County

### Executive Summary

#### BASIC FACTS OF THE CLAIM

<b>Claimant:</b>	John and Dean Muffett
<b>Date Acquired:</b>	October 15, 1980
<b>Location of property:</b>	95886 Templeton Lane, near North Bend
<b>County:</b>	Coos
<b>Acreage of property:</b>	121.83 acres
<b>Zoning:</b>	94.83 acres zoned Forest; 27 acres zoned Exclusive Farm Use/Forest (EFU/F)
<b>Proposed Use:</b>	Divide into lots 20 acres or larger
<b>Monetary Claim:</b>	\$225,000
<b>Claim filed with:</b>	Coos County
<b>Date filed:</b>	May 10, 2005
<b>Claim Status:</b>	Coos County approved claim August 3, 2005; claimant has not submitted claim to the state.

This claim on commercial forestland in Coos County seeks permission to divide a 122 acre parcel into residential lots of 20 acres each. The claimants contend that regulations prohibiting division of their property that were imposed after they purchased the property have diminished its value by \$225,000. The claimants actively manage the land for commercial forestry but seek greater flexibility and the option of residential development.

Coos County has approved the claim, but the claimant has not filed with the state. A state waiver will be required to proceed with development, but the state is no longer accepting or processing claims due to the recent opinion issued by the Marion County Circuit Court in *MacPherson v. Department of Administrative Services*, Case No. 05C10444. This ruling held that Measure 37 is unconstitutional.

The Muffets' parcel is about 14 miles northeast of North Bend in an isolated forest area just south of Tenmile Lakes. Tenmile Lakes suffers from poor water quality, and some fear that additional development in this area will worsen these problems with additional septic systems and impervious surfaces.

If the Muffets proceed to divide the land for residential development, the new owners may choose not to manage the land as commercial forest, removing 122 acres of productive forestland from commercial operation. This may have negative implications for the forest products and wood manufacturing industries in the region.

## **1. Introduction**

This claim raises questions about the impact of residential conversion on the viability of the forest and wood products economies in coastal Coos County. The Muffetts actively manage the land, which previous owners replanted in the 1970s, as commercial forestland. The land has started to produce a profit as the trees have matured over the last few years. The property itself, located about six miles down a gravel road, is relatively isolated except for a nearby cluster of development around Tenmile Lakes.

## **2. Description of the Claim**

Dean and John Muffett estimate that land use regulations have reduced the value of their 122-acre parcel of Forest-zoned land by \$225,000. The Muffetts' claim proposes subdividing the property into residential lots of at least 20 acres each.

The Muffetts purchased the property in 1980. The zoning in place on the property at that time was Interim Agriculture with a 20 acre minimum lot size (IA-20). This designation was adopted by the county in 1975, following LCDRC's adoption of Goal 4, which took effect in January of 1975. The IA-20 zoning allowed residential development on lots at least 20 acres in size. In 1985, Coos County adopted new land use regulations to comply with the state's revised requirements. The 1985 law zoned part of the Muffetts' property Forest and the other part EFU/Forest, both of which limited development on the property. The county has since tightened the regulations due to new state directives, and the minimum lot size today is 160 acres. The Muffetts seek to restore the 20-acre minimum lot size that was allowed when they purchased their property.

## **3. History and Current Conditions**

North Bend is a coastal city that is a summer tourist destination because of its scenic and recreational resources and location on Highway 101. According to 2004 U.S. Census Bureau estimates, about 62,700 people live in Coos County and 9,640 live in North Bend. Coos County's population grew by about 4 percent from 1990 to 2000. Over 19 percent of Coos County's population is over age 64, the sixth highest ratio of any county in the state.<sup>1</sup>

The greater bay area, including North Bend and Coos Bay, form the largest commercial, residential, professional, cultural, and industrial center on the Oregon Coast.<sup>2</sup> Traditionally a center for fishing, logging and wood products, the region has lost natural resources jobs in these industries but increased employment in service and tourism-related industries. The region has experienced a high in-migration of older residents who require medical and other services. Anecdotal evidence from interviews suggests there may be a strong demand for rural residential parcels as people move to the area to either retire. Rising real estate prices are a symptom of this trend.<sup>3</sup>

The Muffetts' property is about 14 miles northeast of North Bend in an isolated forested area just south of the Tenmile Lakes community of Lakeside. This community of about 1,500 people was founded in the mid 19<sup>th</sup> century to take advantage of the communication and trade opportunities provided by the lake.<sup>4</sup> Tenmile Lakes is a popular vacation destination for fishing and other recreation opportunities.

Currently, about there are about 500 homes on Tenmile Lakes and about 350 of those homes use individual septic systems, a fact that might contribute to the current poor water quality in Tenmile Lakes.<sup>5</sup> Oregon Department of Human Service's Environmental

Toxicology Program reports at least four separate blue-green algae blooms in Tenmile Lakes in the past eight years,<sup>6</sup> and the Tenmile Lakes Basin Partnership reports that the most pressing concern in the Tenmile Lakes basin is very poor water quality that poses human health, fish health, and public relations problems for the lake. In fact, the report indicates that the Tenmile Lakes Basin used to support salmon spawning, but today water quality has degraded and predatory fish have moved in, eliminating the salmon from the system.<sup>7</sup>

Although properties near the lake are small, the properties immediately surrounding the Muffetts' property are larger, ranging in size from about 40 acres to 230 acres. The area is wooded and has a history of agricultural and forest uses. These parcels were first logged in 1950. They were replanted and have only recently begun to produce enough trees to make a profit. .

Like the rest of Oregon, the importance of the wood products industry to the south coast economy has declined since the early 1980s. Currently, there are 890,000 acres of non-federal forestland in both Coos and Curry Counties; the value of timber harvested from non-federal lands in Coos County is about \$209 million.<sup>8</sup> In 2003, the forestry and logging industry employed about 750 people in Coos County,<sup>9</sup> with about 900 additional jobs in wood products manufacturing.<sup>10</sup> While these industries comprise only about eight percent of the total payroll employment, they nevertheless are an important part of the region's economic base and its identity.

## 4. Potential for Development

Coos County approved the Muffetts' Measure 37 claim on August 3, 2005, and issued a relatively wide waiver of all land use regulations enacted since the Muffetts' acquired the property in 1980 except for those directly affecting health and safety.

The Muffetts have not submitted a Measure 37 claim to the state, and therefore have received no waiver of the state regulations that established the 160-acre minimum lot size. On October 14, 2005, the Marion County Circuit Court issued an opinion in *MacPherson v. Department of Administrative Services*, Case No. 05C10444, holding that Measure 37 is unconstitutional. On October 24, 2005, the court entered a judgment and an order in the MacPherson case directing all defendants, including the Department of Administrative Services and the Department of Land Conservation and Development, not to accept, grant, deny or otherwise rule on any claims under Measure 37. The order also determined that all timelines under Measure 37 are suspended indefinitely. Moreover, the state believes that all orders to not apply regulations issued before the court decisions have no legal effect, at least pending the outcome of the *MacPherson* appeal.

Therefore, the Muffetts will not have a chance to submit their claim to the state unless the Supreme Court overturns the lower court's decision. The Supreme Court will hear oral arguments on January 10, 2006.

If the Supreme Court overturns the lower court's decision and the Muffetts submit their claim to the state, they may not receive a waiver to develop their land as planned. The Muffetts acquired their property in 1980. This was after Oregon adopted Goal 4—protection of forest lands—in December of 1974, but prior to state's acknowledgement of Coos County's comprehensive plan. In other cases with similar circumstances, the state has ruled that the claimant must comply with the state's goals because acquisition

occurred after the goals were in place. It is unclear whether the state will rule that the 20-acre minimum lot size granted by Coos County is consistent with the Goal 4 rules.

If the Muffetts receive the state waiver required to proceed with the development as proposed in their claim, they will need to file a normal development application with Coos County. The development application will require the Muffetts to show the placement of the lots, roads, and the individual septic systems and wells. Given that the Muffetts propose 20-acre lots, it is unlikely that septic or water would create any insurmountable hurdles for the development.

It is possible that the Muffetts will not develop the property immediately, preferring to hold a waiver because it offers more flexibility in how and when they develop their land.

## **5 Potential Impacts of Development**

If the Muffetts develop their property as proposed in their Measure 37 claim, the resulting development may have a variety of impacts, as described below.

### ***General appearance and neighborhood character***

Given that the Muffetts' claim proposes a residential development with parcels of at least 20 acres, it is unlikely that the development will dramatically impact the character of the neighborhood. It is difficult to predict whether the new property owners living on 20-acre forested lots will prefer to simply enjoy the trees rather than manage the land as commercial forestland. It is possible that the character of the neighborhood will change, expanding the population of people who own second or vacation homes in the neighborhood and shrinking the land owned by experienced forest managers. The neighbors we interviewed for this project did not express concerns about changes in the neighborhood's character because of the development.

### ***Environmental, Health, and Safety***

The development proposed by the Muffetts poses two primary environmental impacts, increased sedimentation and runoff in the streams and lakes on and near the property and slightly increased water quality hazard in Tenmile Lakes. As described above, the water quality in Tenmile Lakes is already compromised. Additional septic and impervious surfaces will contribute to these problems, although their impact will likely be incremental and may not be observable, especially given the large size of the lots.

One possible safety impact is the increased risk of fire damage. The land is relatively inaccessible, and although the property owners can manage to reduce this risk by thinning, brush removal, and creating a defensible zone around the house, these measures are voluntary, and adding even a few new homes in a forested area could require the commitment of extra fire fighting resources in the event of a fire in the area.

### ***Impacts on the economy***

If the Muffetts develop their property as 20 acre residential lots, the new owners may choose not to manage their land for commercial harvest. Although there is no guarantee that dividing the land will remove it from commercial management, smaller size timber lots are much less likely to be logged commercially. The 2002/03 Annual Report of the Oregon Small Woodlands Association indicates that conversion of commercial forestland is a concern for the forest industry and for the state: "Family owned forest land played a critical role in our economy, our environment, and the vitality of our communities.

Despite its increasing importance family forestland is being converted to other issues at over 26,000 acres per year, and much of the remainder is in a passive management state as landowners struggle with a wide variety of issues and concerns.”<sup>11</sup>

Moreover, the local wood products manufacturing industry in the region relies, in part, on a local supply of wood. The average annual employment in wood products manufacturing in Curry and Coos Counties rose from 1320 in 2001 to 1390 in 2004.<sup>12</sup> A small-diameter log mill recently built by Southport Lumber in Coos County relies exclusively on private sources of timber. In addition, a growing segment of this industry is the small businesses that make high value-added specialty products. These rely on affordable local sources of wood. As forestland converts to other uses, the remaining trees become more valuable – and more expensive – for these local industries.

While the Muffetts’ 120 acres is a very small percentage of all the private forestland in Coos County and Oregon, converting it to residential properties will incrementally contribute to a trend that has implications for the future health of the forest economy. Coos County has received 57 claims that comprise over 5,000 acres in the county. Multiple claims such as the Muffetts’ could have a cumulative impact that will further compromise the forest products and wood products industries.

## **6. Summary**

It is unclear whether residential development will occur on the 122 acres owned by the Muffetts in Coos County. Before development can proceed, the state will have to provide a waiver to the Muffetts similar to the county’s waiver that allows the parcel to be divided into 20-acre parcels for residential development.

This type of development may remove the parcels from commercial timber production, reducing the local timber available to the wood products industry. Additional residential development will also increase the impervious surfaces in the area and add additional septic systems, placing additional stress on the ground and surface water in the area. However, the relatively large size of the lots will minimize the impacts provided these surfaces are properly placed.

## **7. Sources Consulted and Persons Interviewed**

### **Documents Consulted:**

City of North Bend Comprehensive Plan. June 2003. Retrieved December 19, 2005, from <http://www.northbendcity.org/North-Bend-City-Planning-Ordinances.htm>.

Coos County Staff Report, Measure 37 Claim Submitted by John and Dean Muffett. August 3, 2005.

Family Forest Leaders Past Present and Future: 2002/2003 Annual Report and Project Plan. Oregon Small Woodlands Association. Retrieved December 20, 2005, from <http://www.oswa.org/OSWA2003Annual.pdf>.

Oregon Outlook. December 2003. Portland State University, Population Research Center. Retrieved December 19, 2005, from <http://www.pdx.edu/prc/oregonoutlook.html>.

Tenmile Lakes Septic Systems. February 12, 2001. State of Oregon Department of Environmental Quality Fact Sheet. Retrieved December 19, 2005, from [www.deq.state.or.us/wq/wqfact/TenmileLakes.pdf](http://www.deq.state.or.us/wq/wqfact/TenmileLakes.pdf).



Tenmile Lakes Watershed Assessment. Tenmile Lakes Basin Partnership. Retrieved December 20, 2005, from [http://tlbp.presys.com/TLBP\\_WS\\_Assessment.pdf](http://tlbp.presys.com/TLBP_WS_Assessment.pdf).

### **Persons Interviewed:**

Frank Burris, Oregon State University Extension, Coos and Curry Counties

Geraldine Mercer

Jon Souder, Coos Watershed Association

Nikki Whitty, Coos County Commissioner

### **Case Study Reviewer**

Anne Berblinger

## **Endnotes**

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<sup>1</sup> Oregon Outlook. December 2003. Portland State University, Population Research Center. Retrieved December 19, 2005, from <http://www.pdx.edu/prc/oregonoutlook.html>.

<sup>2</sup> City of North Bend Comprehensive Plan. June 2003. Retrieved December 19, 2005, from <http://www.northbendcity.org/North-Bend-City-Planning-Ordinances.htm>.

<sup>3</sup> <http://www.qualityinfo.org/olmisj/ArticleReader?itemid=00004644>. Accessed December 20, 2004

<sup>4</sup> Welcome to Lakeside, Oregon. The South Coast Oregon Directory Cities Guide. Retrieved December 19, 2005, from <http://www.scod.com/cities/lakeside/>.

<sup>5</sup> Tenmile Lakes Septic Systems. February 12, 2001. State of Oregon Department of Environmental Quality Fact Sheet. Retrieved December 19, 2005, from [www.deq.state.or.us/wq/wqfact/TenmileLakes.pdf](http://www.deq.state.or.us/wq/wqfact/TenmileLakes.pdf).

<sup>6</sup> Blue-green algae advisories. Oregon Department of Human Services Environmental Toxicology Program website. Retrieved December 19, 2005, from <http://www.oregon.gov/DHS/ph/envtox/maadvisories.shtml>.

<sup>7</sup> Tenmile Lakes Watershed Assessment. Tenmile Lakes Basin Partnership. Retrieved December 20, 2005, from [http://tlbp.presys.com/TLBP\\_WS\\_Assessment.pdf](http://tlbp.presys.com/TLBP_WS_Assessment.pdf).

<sup>8</sup> <http://extension.oregonstate.edu/coos/Forestry/>. Accessed December 19, 2005.

<sup>9</sup> County Business Patterns. <http://www.census.gov/epcd/cbp/view/cbpview.html>. Accessed December 20, 2005.

<sup>10</sup> <http://www.qualityinfo.org/>. Accessed December 20, 2005

<sup>11</sup> Family Forest Leaders Past Present and Future: 2002/2003 Annual Report and Project Plan. Oregon Small Woodlands Association. Retrieved December 20, 2005, from <http://www.oswa.org/OSWA2003Annual.pdf>.

<sup>12</sup> <http://www.qualityinfo.org/>. Accessed December 20, 2005

# Case Study 9: A Ranchland Subdivision near City Limits

## Executive Summary

### BASIC FACTS OF THE CLAIM

<b>Claimant:</b>	H.M. and Willa Mae O'Rourke
<b>Date Acquired:</b>	1957 and 1969
<b>Location of property:</b>	63977 Imnaha Highway
<b>County:</b>	Wallowa
<b>Acreage of property:</b>	68.91 Acres
<b>Zoning:</b>	EFU
<b>Proposed Use:</b>	Divide into 33 lots and develop a residential dwelling on each lot
<b>Monetary Claim:</b>	\$1,980,000
<b>Claim filed with:</b>	State and County
<b>Date filed:</b>	4/22/2005 (state); 6/16/2005 (county)
<b>Claim Status:</b>	Approved by county and state

Mr. and Mrs. O'Rourke filed their Measure 37 claim with the aim of developing their 69-acre ranch property into a high-end 33-lot subdivision just outside the city of Joseph. The claim has been approved by Wallowa County and the State of Oregon. In granting the waiver, the county also approved the O'Rourke's development application, and the O'Rourke's have already begun working on the subdivision.

This isolated community with a history of ranching is located in one of the most stunningly beautiful regions of Oregon. Close to Wallowa Lake, at the foot of the Wallowa Mountains, and near the Hells Canyon National Recreation Area, this town is becoming an artists' enclave and a recreational magnet. Its population has been steady over the last few years, but demand for vacation homes has created a market for the development the O'Rourkes have proposed.

The proposed development takes full advantage of the area's spectacular mountain views. Located less than a mile from the city limits, the subdivision would be convenient to the retail area in Joseph, and a reasonable drive from the larger town of Enterprise. But because the land is outside the city limits, it will be developed without city sewer or water service.

Although this land has some of the highest soil quality land in the county, there is very little concern among farmers about residential conflicts or about the loss of ranchland because the land is so close to town. Many residents feel that the proposed development will benefit the community by increasing economic activity and housing.

However, this case study demonstrates the potential missed opportunities created by Measure 37 claims. The subdivision seems a logical extension of the geography of the city of Joseph. Extending the urban growth boundary or the city limits would provide urban services and an opportunity to better integrate the development with the rest of the community and prevent sprawl. Instead, this development will proceed outside city limits without city services.

# **1. Introduction**

This claim offers insight into the attitudes and conditions for development in isolated ranching communities. The O'Rourkes' property is located in far northeastern Oregon, in Wallowa County at the foot of the Wallowa Mountains. This was the first claim to be processed in Wallowa County; the county has received a total of ten claims. The owners are ready to proceed with their plans, but have delayed any further work pending the decision of the Oregon Supreme Court regarding the constitutionality of Measure 37.

## **2. Description of the claim**

H.M. and Willa Mae O'Rourke estimate that land use regulations have reduced the value of their 69-acre property by \$1.98 million. The O'Rourke's Measure 37 claim requests approval to subdivide their property into a residential subdivision of 33 lots ranging in size from 1.3 to 2.6 acres each.

When the O'Rourkes acquired the two tax lots in 1957 and 1969, the county had not zoned the property and the state had not yet passed the statewide land use planning goals. Today, the Wallowa County Zoning Ordinance zones the O'Rourke's property Exclusive Farm Use (EFU) and zoning regulations do not allow division of the property into parcels less than 160 acres.

## **3. History and Current conditions**

The O'Rourkes' property is less than three-quarters of a mile east of the City of Joseph in Wallowa County. This remote community lies in one of the most scenic regions of Oregon, at the foot of the Wallowa Mountains, near the Hells Canyon National Recreational Area. Traditionally a ranching and timber community, Wallowa County is increasingly becoming a tourist destination and a haven for artists and craftsmen.

Wallowa County's population in 2004 was estimated at 7,150; a decline of 76 from the Census 2000 count of 7226. The city of Joseph contains 1080, a slight rise from the Census 2000 county of 1054.<sup>1</sup> In 2000, the city of Joseph had 543 housing units, including 226 owner-occupied single family homes. The median value of single family homes in Joseph in 2000 was \$103,900. Wallowa County had 3,900 housing units and the median home value in the county in 2000 was \$111,300.<sup>2</sup>

The County suffers from chronically high unemployment rates with annual averages between eight and 10 percent since the mid-1990s. The unemployment rate falls during the summer and early fall months when tourists and hunters fill hotels and restaurants, and purchase gear and services for their adventures.<sup>3</sup> With a variety of recreational amenities, this area's tourism is climbing; lodging tax revenues increased 17 percent over the past year.

Wallowa County has over 86,000 acres of farmland, with about 50,000 in active cropping and about 30,000 being grazed. Agricultural revenue has climbed in recent years. The total gross farm sales in Wallowa County climbed from under \$30 million in 2002 to over \$41 million in 2004. The increase can be attributed to increases in revenue from both crops and livestock.<sup>4</sup>

Historically, the land that is today the O'Rourke property was a cattle ranch. After purchasing the property in the 1950s and 60s, the O'Rourkes continued to work the entire property as a cattle ranch. Today, about half of the property is a golf driving range. The O'Rourkes applied for and received a conditional use permit from the county to develop the driving range. They lease the other half of their property to a neighbor, who grazes cattle on the land.

Parcels ranging in size from about 20 acres to 200 acres and zoned for EFU surround the O'Rourke's property to the east and north. To the south, parcels range in size from 1 to 15 acres, and the City of Joseph, with its urban-style grid and densities, is to the west. Specifically, several 5 acre parcels separate the O'Rourke's property from the City of Joseph. At least one of these owners has connected his home to the city's water and sewer systems.

#### **4. Potential post-claim scenario**

Both Wallowa County and the State of Oregon approved the O'Rourkes' Measure 37 claim. Along with its waiver, Wallowa County provided preliminary approval for the subdivision development applications, so the O'Rourkes will not need to file a separate subdivision application with the county. In addition, the county wrote into their waiver the transferability of the waiver to future owners of the property, effectively attaching the waiver to the land rather than to the specific owners. This means that unlike most other Measure 37 claimants, the O'Rourkes can sell their property to a developer and the developer could proceed to act on the waiver. This transferability provision has not been used in other counties because the Oregon Attorney general has issued an opinion that these waivers are not transferable to new owners. The Wallowa County practice of issuing transferable waivers has not been challenged in court. The O'Rourkes have already platted the subdivision and had planned to begin building the roads and drilling test wells in early 2006.

However, on October 14, 2005, the Marion County Circuit Court issued an opinion in *MacPherson v. Department of Administrative Services*, Case No. 05C10444, holding that Measure 37 is unconstitutional. On October 24, 2005, the court entered a judgment and an order in the MacPherson case directing all defendants, including the Department of Administrative Services and the Department of Land Conservation and Development, not to accept, grant, deny or otherwise rule on any claims under Measure 37. The order also determined that all timelines under Measure 37 are suspended indefinitely. Moreover, the state believes that all orders to not apply regulations issued before the court decisions have no legal effect, at least pending the outcome of the *MacPherson* appeal.

Therefore, the O'Rourke's state order to not apply the relevant regulations will not likely have any legal power unless the *MacPherson* decision is overturned. The Supreme Court will hear oral arguments on January 10, 2006. In light of these developments, the O'Rourkes have suspended their plans to develop the property until the Supreme Court issues a final decision.

If the O'Rourkes can proceed with the development, they will first develop the lots closest to the City of Joseph. As a county subdivision not included in the City of Joseph, the lots will have Oregon Department of Environmental Quality-approved individual septic systems ready for hookup, but the buyers of the lots will need to develop individual wells.

Given the small supply of small acreage rural residential lots available in Wallowa County, and the increase in demand for vacation property, it is reasonable to believe that there will be a strong market for these properties. The lots will be offered for approximately \$100,000 each.

#### **5 Potential Impacts of Development**

If the Oregon Supreme Court overturns the Marion Circuit Court's decision to invalidate Measure 37 or if a similar and constitutionally-valid measure passes in the future, it is likely that the O'Rourkes will be able to develop their 69-acre EFU property as a 33-lot residential subdivision. The potential impacts of this development are described below.

## ***General appearance and neighborhood character***

The subdivision will obviously increase the density and number of people located just outside the city's limits. Although the development will convert ranchland to homesites, there is very little concern among the neighbors about the increased density or population, particularly given the location of the property so close to the city limits.

## ***Environmental, health, and safety***

Given that the City of Joseph is not growing and anecdotal evidence that realtors have many urban-size lots available for sale or development within the city's urban growth boundary, it is unlikely that Joseph will incorporate the O'Rourke's property into the city's urban growth boundary. As a result, the residences in the O'Rourke's subdivision will likely have, as planned, individual wells and septic systems. Although septic systems can be long-term solutions for treating wastewater, the systems require maintenance or they will fail, contaminating wells or surface water and creating health concerns.<sup>5, 6</sup>

Water supply could also be affected. The O'Rourke's property is on a sloping grade with an irrigation ditch at the far north end. The drilling of individual wells might affect lower level water supplies.

## ***Impacts on agriculture and the economy***

Concerns about the loss of farmland and the potential conflict between residential and agricultural uses are often cited as a concern regarding Measure 37 claims that convert EFU land to residential homesites. Although these general concerns are shared by many of the community members we interviewed, they discount their importance in this case, due to the location of the O'Rourke's property less than a mile from Joseph's city limits.

Nevertheless, some express concern that residential development will have a negative impact on the sustainability of ranching in the area. Ranchers actively graze between 25,000 and 30,000 acres in Wallowa County, and the O'Rourke property may seem insignificant by comparison. Yet a number of factors, including the increasing price of beef and development pressure, have caused substantial increases in the price of large tracts of land in Wallowa County, preventing some producers from expanding. Furthermore, the O'Rourke property has some of the more productive soil classes in the county (classes 3 and 4 soil). Some question whether it might be more appropriate to convert less productive farmland for residential use to save the most productive sites for sustaining the agricultural economy.

Many neighbors believe that the residential subdivision proposed by the O'Rourkes will improve the community by bringing more people into the community, increasing the housing units available for purchase, and increasing economic activity and jobs.

## ***Local government***

Some neighbors worry that developing 33 lots and an average 2 acres per lot with individual septic systems and wells will, in the long term, create problems if the septic systems fail. In particular, these neighbors expressed concern that the City of Joseph would, eventually, spend tax dollars to extend the city's sewer and water services to residents in the new subdivision.

This raises questions and concerns about the impact of this claim, and Measure 37 in general, on the city's ability to plan for efficient growth. If properly planned and financed, the City of Joseph could extend urban services efficiently and grow in a way that complements and enhances the current urban grid development that characterizes Joseph. As planned, the

development proposed by the O'Rourke is a typical rural residential subdivision, characterized by large lot residential development and low street network connectivity. Research suggests that planned urban forms may provide health, environmental, and economic benefits not afforded by rural residential or suburban-style development.<sup>7, 8, 9</sup>

## 6. Summary

If Measure 37 is overturned by the Oregon Supreme Court, this claim will probably result in 32 new residences just outside the city of Joseph. While these new residences alone will probably not have a negative impact on the agriculture economy, they do represent a missed opportunity to develop the property in a way that will prevent inefficient development that is expensive to serve.

## 7. Sources Consulted and Persons Interviewed

### Documents Consulted:

Oregon Department of Land Conservation and Development, Final Staff Report and Recommendation, Ballot Measure 37 Claim M118349, October 14, 2005.

Wallowa County, Measure 37 staff report.

### Persons Interviewed:

E.H. Van Blaricom

Ben Boswell, Wallowa County Commissioner

Tom Crooks

Jean Pekarek and

H.M. O'Rourke.

Randall Parmelee

Thomas Rayburn

John Williams, Agriculture Agent, Oregon State University Extension Service

## Endnotes

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<sup>1</sup> Cai, Qian. 2005. Oregon Population Report. Population Research Center, Portland State University, March. [http://www.pdx.edu/media/p/r/prc\\_2004\\_Population\\_Report.pdf](http://www.pdx.edu/media/p/r/prc_2004_Population_Report.pdf). Accessed November 18, 2005

<sup>2</sup> U. S. Census Bureau. [www.census.gov](http://www.census.gov).

<sup>3</sup> Oregon Employment Department, OLMIS. <http://www.qualityinfo.org/>. Accessed December 19, 2005

<sup>4</sup> Oregon State University, Extension Economic Information Office. 2004. Agricultural summary, Wallowa County, 2004.

<sup>5</sup> Hallahan, Dennis F. 2002. The standard septic system: Still an effective choice for onsite wastewater treatment. *Water Engineering & Management*, 149(10), 33-36.

<sup>6</sup> Gattfield, Stephen J; Goo, Robert L.; Richards, Lynn A.; and Jackson, Richard J. 2003. Public health effects of inadequately managed stormwater runoff. *American Journal of Public Health*, 93, 1527-1533.

<sup>7</sup> Frank, Lawrence D., and Engelke, Peter. 2005. Multiple impacts of the built environment on public health: Walkable places and exposure to air pollution. *International Regional Science Review*, 28, 193-216.

<sup>8</sup> Moudon, Anne Vernez, and Paul Mitchell Hess. 2000. Suburban clusters: The nucleation of multifamily housing in suburban areas of the central Puget Sound. *Journal of the American Planning Association*, 66, 243-264.

<sup>9</sup> Ewing, Reid. 1997. Is Los Angeles-style sprawl desirable? *Journal of the American Planning Association*, 63, 107-126.



# Case Study 10: Forestland Conversion near Grants Pass

## Executive Summary

### BASIC FACTS OF THE CLAIM

<b>Claimant:</b>	Alvin and Dorothy Anderson
<b>Date Acquired:</b>	March 31, 1955
<b>Location of property:</b>	8500 North Applegate Road, Grants Pass
<b>County:</b>	Josephine County
<b>Acreage of property:</b>	40.27 acres
<b>Zoning:</b>	Woodlot Resource (WR)
<b>Proposed Use:</b>	Divide the property into eight 5-acre lots
<b>Monetary Claim:</b>	\$1,200,000
<b>Claim filed with:</b>	State of Oregon and Josephine County
<b>Date filed:</b>	April 29, 2005 (county)
<b>Claim Status:</b>	State of Oregon found the claim valid (October 21, 2005). Josephine County found the claim valid (August 4, 2005).

Alvin and Dorothy Anderson filed a measure 37 claim with both Josephine County and the State of Oregon. Their goal is to divide their 40-acre woodlot resource parcel into 5-acre parcels and convert it to residential use. They have tried, without success, to achieve the same outcome by requesting an amendment of the county's comprehensive plan based on the productivity of their land. Their claim has been found valid by both the county and the state since the regulations restricting division of their property were enacted after they acquired the property. Their ability to proceed with their plans depends on the outcome of the Oregon Supreme Court's upcoming review of the constitutionality of Measure 37.

The Andersons' property is only 6 miles from the city of Grants Pass, a quickly-growing community in Josephine County. This southern Oregon county has grown in both population and employment, and the structure of the economy is changing as the population grows. The claim's location 6 miles from Grants Pass makes it a desirable location for residents with access to jobs, shopping, and services in Grants Pass. It is surrounded by both smaller residential parcels and larger woodlot resource parcels.

The primary concern about this claim is the conversion of woodlot resource land to residential land. Any decrease in the supply of private timberland raises concerns because of today's restricted supply of timber. Although this land is currently fallow, its conversion to residential use will effectively prevent any timber production in the future, and may affect the productivity of nearby timberland.

There are also environmental concerns whenever development adds septic systems and impervious surfaces that affect water quality. The loss of open space may affect wildlife habitat. The development will increase demand for county services, and may increase the probability of human-caused fires and the cost of fire protection.



# 1. Introduction

Located in Josephine County about 6 miles south of the City of Grants Pass, near the very small town of Murphy, Alvin and Dorothy Anderson's Measure 37 claim proposes developing their 40 acre woodlot resource parcel as a residential subdivision of eight 5-acre lots. The claim raises general concerns about the impacts of development on open space and environmental quality. It also takes potential woodlot resource land out of production.

## 2. Description of the Claim

Dorothy and Alvin Anderson estimate that land use regulations have reduced the value of their southern Oregon 40 acre property by \$1,200,000. The Andersons' claim proposes dividing the property into a residential subdivision of 8 5-acre lots.

When the Andersons purchased the property in 1955, the county had not zoned the property. In 1973, the county zoned the property suburban residential, and then, in 1981 the county changed the zoning to rural residential with 5-acre minimum lot size. The State of Oregon adopted Goal 4—protection of Forestland—in December of 1974; it was effective in January of 1975. The administrative rule implementing Goal 4 became effective on September 1, 1982. As a result, in 1985, Josephine County passed a Zoning Ordinance designates the land Woodlot Resource (WR) with an 80 acre minimum lot size.

The Andersons have tried to develop the land prior to the passage of Measure 37 by demonstrating that the land does not meet the requirements of resource land in need of protection. The county and state have allowed comprehensive plan amendments in the past on this basis. The Andersons have tried to meet their objectives using this approach but have been unsuccessful.

## 3. History and Current Conditions

The City of Grants Pass is located in Josephine County on I-5. The city's population has grown steadily since the 1960s to its current number of 25,423. The population grew 3.9 percent between 2003 and 2004. The area has been known as a magnet for retirees and over 19 percent of the city's population is over age 65, one of the highest percentages in the state.<sup>1</sup> Josephine County's population mirrors Grants Pass' population trends. The county's population increased 25 percent from 62,649 in 1990 to 78,600 in 2004.<sup>2</sup> Over 20 percent of the county's residents are over age 65.<sup>3</sup>

Josephine County's economy has been growing, and the structure of the economy is changing to reflect its demographic shift. In 2001 and 2002, when the remainder of the state was shedding jobs, Josephine County's employment was growing. From 2001 to 2004, the county gained over 2000 jobs, a 9 percent increase in three years. The county has shed jobs in timber products over the last two decades, and employment in the wood products industry fell by 30 percent from 2001 to 2004, although it began to rebound in 2005.<sup>4</sup> Growth has occurred in construction, wholesale and retail trade, and services, particularly healthcare services. The percentage of income from transfer payments (payments from government or business for which no goods or services are received in return, such as social security, unemployment, or pensions) has risen from 21 percent in 1990 to 27 percent in 2003. This compares to the statewide average of about 15 percent<sup>5</sup>.

The Andersons' 40-acre property, located about 6 miles south of Grants Pass, is currently fallow and is mostly open fields. It is adjacent to parcels ranging in size from 1 to 20 acres. There are

several larger—40- to 80-acre—parcels scattered to the north and south of the Anderson property.

#### **4. Probability of Development as Planned**

The county and the state found the Andersons' claim valid and ordered the jurisdictions to not apply the regulations preventing the division of the property. However, on October 14, 2005, the Marion County Circuit Court issued an opinion in *MacPherson v. Department of Administrative Services*, Case No. 05C10444, holding that Measure 37 is unconstitutional. On October 24, 2005, the court entered a judgment and an order in the MacPherson case directing all defendants, including the Department of Administrative Services and the Department of Land Conservation and Development, not to accept, grant, deny or otherwise rule on any claims under Measure 37. The order also determined that all timelines under Measure 37 are suspended indefinitely. Moreover, the state believes that all orders to not apply regulations issued before the court decisions have no legal effect, at least pending the outcome of the *MacPherson* appeal.

Therefore, the Andersons' state and county orders to not apply the relevant regulations will not likely have any legal power unless the *MacPherson* decision is overturned. The Supreme Court will hear oral arguments on January 10, 2006.

If the Supreme Court overturns the *MacPherson* case, the Andersons will be able to proceed with their proposed development. In order to do so, they will need to submit a normal land use application to Josephine County, which will require the Andersons to comply with current health and safety regulations. The 5-acre lots proposed by the Andersons are not likely to pose any problems for the development of individual septic systems and wells. The subdivision will need to have an interior road network with access points approved by the county.

If their subdivision is approved, the Andersons will probably find a strong market for their lots. The rates of population, job, and housing price growth in Josephine County suggest that there will be a strong demand for the residential parcels if they go on the housing market.

#### **5. Potential Impact of Development**

Due to the small size of this development, its individual impacts are will be minor. These impacts include a change in the appearance and character of the neighborhood; potential environmental impacts due to loss of open space and stormwater runoff; and effects on the forest economy. The development might also add costs for local and state government. These are discussed below.

Although the impacts of this development seem minor, they should be considered in the context of the total number of Measure 37 claims on forest land. Although we do not know the total extent of these claims, we do know of at least 25 Measure 37 claims on forest land in Josephine County totaling 1665 acres.<sup>6</sup>

##### ***General appearance and neighborhood character***

If the Andersons' property is developed as proposed in their Measure 37 claim, the new property will likely match some of the surrounding neighborhood. As explained above, the property is surrounded by some small rural residential parcels, as well as larger forestland parcels. Adjacent neighbors may lose valued view and open space amenities as a result of the development; commercial forestry operations may face further industry/residential conflict. However, no neighbors testified at the county's hearing about the claim and that the state

received only two comment letters. The owners of adjacent properties do not appear to strongly oppose the proposed development.

### ***Environmental, health, and safety***

Development of individual septic systems and wells on the new lots will probably not create problems since the area is not designated as groundwater limited and the five-acre lots are generally large enough to comfortably site a septic system drainfield.

Parcelization of the Andersons' property, though, will incrementally contribute to trends affecting the environment. Specifically, experts we interviewed indicated that converting WR land to residential property will almost surely increase sedimentation and stormwater runoff into creeks and streams in the area. The effect of residential development on sedimentation and runoff is well documented.<sup>7, 8</sup> Second, evidence indicates that open space corridors have important benefits for wildlife, even in rural residential areas. Dividing the Andersons' property may break corridors important to the existence of wildlife.<sup>9</sup> Both of these environmental effects, of course, contribute to a trend in Josephine County and elsewhere; in isolation, this development will have minor effects on the environment.

### ***Impacts on the Forest Economy***

Dividing the Andersons' property eliminates the possibility that the land will eventually produce timber. Although the land does not currently produce timber, the conversion of the land adds to concerns about the shrinking of the forest economy in Josephine County. As it has throughout the Northwest, the timber industry has contracted as sources of timber have declined, and the economy has become increasingly dependent on population-based and service industry jobs. Only one mill remains open in the county. The shrinking forestry infrastructure places further burdens on small woodlot owners because there are fewer buyers for their timber. Several small operations conduct value-added wood processing such as cabinet and furniture making. These craftsmen depend on local sources of timber. Furthermore, additional residential development in natural resource areas increases the conflict between the commercial timber operations and residents, which may further decrease the likelihood that this area will produce commercial timber. Studies have shown that increases in population density reduce the probability that forests will be managed for commercial timber production.<sup>10</sup>

### ***Local government***

The 8-lot development proposed by the Andersons is unlikely to have any major impacts on local government. Developing small lot residential subdivisions, even subdivisions with five-acre lots, almost always raises questions about whether a local government will eventually incur the cost of extending infrastructure to the new development. In this case, the development will be 6 miles away from the City of Grants Pass and it will be near houses on similarly-sized lots with individual septic systems and wells. If, twenty or thirty years from now, septic systems in the new subdivision fail and require the city to extend sewer access, it is likely that the Andersons' subdivision will be just one of many residential developments the city will need to serve.

An additional concern of local government is the increase in fire risk and the costs to fight fire. The Oregon Department of Forestry has studied the impact of development on wildland forest fires and has found a strong correlation between the number of dwellings and the number of human-caused fires. In addition, residential development increases the cost of wildland fire protection.<sup>11</sup>

## 6. Summary

If the Oregon Supreme Court upholds Measure 37, the Andersons will be free to pursue their development as planned. They will probably find a ready market for their five-acre rural residential lots 6 miles from the growing city of Grants Pass. Their development of five-acre residential lots will have the usual impacts of development on forest land: loss of open space, increase of stormwater runoff, loss of wildlife corridors, and increased risk of fire. While these impacts are small for this specific development, many observers worry about the cumulative impact of the development proposed by thousands of Measure 37 claims across the state.

In addition, any loss of potential timberland is of concern to those working to maintain a healthy forest economy. Although this 40-acre parcel is fallow, its conversion to residential property will prevent any use as timberland in the future and may cause conflicts between residential and commercial timberland uses. Other Measure 37 claims on similar and larger tracts of forest land will contribute to the declining supply of timber in Oregon and hasten the decline of the industry.

## 7. Sources Consulted and Persons Interviewed

### Documents Consulted:

Oregon Department of Land Conservation and Development, Final Staff Report and Recommendation, Ballot Measure 37 Claim M118376, July 19, 2005.

Josephine County Board of County Commissioners, Order no. 2005-069, Anderson measure 37 Order.

### Persons Interviewed:

Max Bennet, Oregon State University Extension Service

John Renz, Department of Land Conservation and Development

### Case Study Reviewer:

Kevin Birch, Oregon Department of Forestry

## Endnotes

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<sup>1</sup> Profile of the City of Grants Pass. City of Grants Pass. Retrieved December 20, 2005, from <http://www.ci.grants-pass.or.us/B06prof.pdf#search='grants%20pass%20retirees'>.

<sup>2</sup> Cai, Qian. 2005. Oregon Population Report. Population Research Center, Portland State University, March. [http://www.pdx.edu/media/p/r/prc\\_2004\\_Population\\_Report.pdf](http://www.pdx.edu/media/p/r/prc_2004_Population_Report.pdf). Accessed November 18, 2005.

<sup>3</sup> Grants Pass/Josephine County, Oregon Economic Profile Summary 2003. City of Grants Pass Economic Development Office. Retrieved December 20, 2005, from <http://www.visitgrantspass.org/econdev/Acrobat/econ-summ-2003-dr.pdf#search='josephine%20county%20profile'>.

<sup>4</sup> Oregon Employment Department, Covered Employment and Wages. <http://www.qualityinfo.org/olmisj/>. Accessed January 4, 2006

<sup>5</sup> Bureau of Economic Analysis: [www.bea.gov](http://www.bea.gov). Accessed January 4, 2006.

<sup>6</sup> We derived this data from Measure 37 claim forms submitted to the state and county governments. There are almost certainly more claims on forest land for which we do not have data. We are currently working on collecting all the claims data to more accurately describe the total claims on forest land throughout the state.

<sup>7</sup> Gray, Lawrence. 2004. Changes in water quality and macroinvertebrate communities resulting from urban stormflows in the Provo River, Utah, U.S.A. *Hydrobiologia*, 518, 33-46.

<sup>8</sup> Konrad, Christopher, and Stephen J. Burges. 2001. Hydrologic mitigation using on-site residential stormwater detention. *Journal of Water Resources Planning and Management*, 127, 99-108.

<sup>9</sup> Schlotterbeck, Jennifer. 2003. Preserving biological diversity with wildlife corridors: Amending the guidelines to the California Environmental Quality Act. *Ecology Law Quarterly*, 30, 955-990.

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<sup>10</sup> Wear, D.N. 1999. The effects of population growth on timber management and inventories in Virginia. *Forest Ecology Management* 118: 107-115.

<sup>11</sup> Oregon Department of Forestry, 1993. Wildfire prevention and control in areas of residential forest land development: An analysis of fire data. Salem.